PLEADINGS

In some remarkable Cases,

Before the Supreme Courts of

SCOTLAND,

Since the Year, 1661.

To which, the *Decisions* are subjoyn'd.

By Sir *GEORGE M'KENZIE.*

Cicero *in Brut.*

Nulla res tantum ad bene dicendum prodest, quantum scriptio.

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Cicero in Orat.

Nulla res maiorem ad laudem directam habet,
quàm gratum Populo.

to prefer this to all other employments, and to refine themſelves to all imaginable hight in it; by the joynt hopes of glory, applauſe, preferment, money and emulation:

Stimulos dedit æmula virtus.

I doubt not but there are many, who will think that Eloquence is not allowable at the Barr, ſince thoſe who are to be convinced there, are old and reverend Judges, whoſe ſevere Judgments are not to be moved by a pleaſing diſcourſe, but by ſolid reaſon, old Age being little taken with thoſe flouriſhes, which it cannot practiſe: and that though where paſſions are to be excited, as they are by the Pulpit, and Theater, or where Stateſ-men endeavour to reclaim a mutinous multitude, There, Eloquence is not only allowable, but neceſſary (Eloquence being the true key of the paſſions) yet, ſince no paſſions are allowed in judging, and the object of that excellent Science, being truth, and not humor, Eloquence ſhould not be allowed in diſcourſes there: And I imagine it will be objected to me, that at the firſt inſtitution of our Senat, It was appointed by an Act of *Sederunt*, That all Argunning (which term was us'd in that Age for arguing) ſhould be *Silogiſticé*, and not *Rhetoricé*.

To which my anſwer is, that Eloquence do's not only conſiſt in trops, figures, and ſuch extrinſick ornaments, whereby our fancy is more gratified, then our judgement, and our diſcourſe is rather painted then ſtrengthned; but when I mean that an Advocat ſhould be eloquent, I deſign thereby, that he ſhould know how to enliven his Diſcourſe with expreſſions ſuitable to the Subject he treats; that he ſhould chooſe terms that are ſignificant, and which ſeem full of the thing which they are to expreſs, and ſo lodge his reaſons handſomly; though when his Subject looſes him from the ſtrict terms of a Statute, or Authority, and that he is to debate upon probable Theams, to enquire into publick utility, or to enforce or anſwer preſumptive Arguments, he may uſe a more florid and elegant

Stile: his great design is to conciliat favour to his Clients Cause; and sure, *cæteris paribus*, even the learnedst and most severe Judges, love to be handsomly informed, and he must be very just, who is not somewhat bribed by charming expressions. But that the greatest part of Judges are taken with that bait, is most undenyable; and as in Mariages we find, that even those who desire rich Portions, are yet pleased to have a beautiful Mistris, and the severest man alive will be content to abate somewhat of the Portion to gratifie his fancy; So, I am sure that a *Papinian* or *Ulpian*, would, when the scales seem to stand even, encline to that side upon which Eloquence stands. Eloquence raises the attention of a Judge, and makes him follow the speaker closely, so that nothing which he sayes in favour of his Client passeth unregarded; whereas another may say what is very reasonable, and which if it were notic'd, might weigh much; and yet the Judge who is not allured to hear attentively, may easily miss it.

I may likewayes add, that Eloquence thaws (like the Sun) the speaker himself, who when he is warm and pleas'd, will thereby have his invention stirr'd up, and his memory and all his faculties opened; by which many excellent and appositе reasons may be suggested to him; as we see the Earth (when warm'd) casts up many new and profitable fruits and herbs, as well as flowers; whereas, we may dayly observe, that a stiff and cold pleader do's omit oftimes, even what he knowes. By the same Eloquence also, the hearers being warm'd and thaw'd have their Judgements thereby open'd, and doe receive more easily impressions of what is spoke; and I conceive Eloquence the fitter for Advocats, that others think it should be banish'd as that which may bryb and corrupt Judges: and methinks it should be pardon'd some little dangerousness that way, since it pleases so much another; nor can I think but that Providence has ordain'd it for the

the Barr, to ſoften, and ſweeten humours, which would els by conſtant ſticking at meer Law, become too rigid and ſevere; and to divert and eaſe the Spirits both of Judges, and Advocats, which are too much upon the rack, and bended for the ſervice of their Countrey.

As to our Act of *Sederunt*, which appointed, that all pleading ſhould be *ſylogiſticè*, I need not reflect upon the ignorance of thoſe times, which was very excuſeable amongſt us, ſince it did at that time blind even *Italy* and *France*, who do now ſmile with pity upon the cuſtoms and productions of their countrey-men in that Age: but I conceive, that our Seſſion having been at firſt conſtitute of an equal number of Church-men and Laicks, and the Preſident being an Eccleſiaſtick, theſe Church-men having the advantage of Learning and Authority, did form that Act of *Sederunt* according to their own breeding, by which they were tyed in their Theology-ſchools to debate by Syllogiſmes; but after-ages having found this upon experience to be very unfit and pedantick, they did not only ſuffer that Act to run in deſuetude, but allow'd of this auguſter and more ſplendid manner of debating, which is now uſed. And therefore I conclude, that not only is that way not warranted by the Authority of that Act, but that it has the leſs preference becauſe of that Act; for, if that Act had not been made, we might have been induc'd to believe that ſuch a way might take; but now ſince experience has reform'd us from it, and ſince even the Authority of a Statute could not maintain it, we muſt think it was not fit nor ſuitable, as indeed it is not, if we conſider theſe few remarks.

All Sciences have an expreſſion which is ſuitable to them; the Mathematicks require demonſtration, and diſcover themſelves to the eye: Medicine, and natural Philoſophy require experiments; Logick, Metaphyſick (and alas now Theology) muſt wreſtle by ſyllogiſmes; but the Law argues by a diſcourſe, free, and unconfined, like thoſe who debate from its principles.

ciples. It is the nature of a ſyllogiſme to have the ſubſumption in the ſecond propoſition; but in pleading, the matter of fact muſt come firſt, for it ſtands in the ſtate of the caſe, and therefore though it be proper for Lybells (which are but a Sylogiſme) yet it ſuits not with a Defence: and it were very ridiculous, and impoſſible, to wrap up a long ſtory, many circumſtances, preſumptions and probabilities in a ſyllogiſme; and oftimes there are many defences propon'd and joyned together. The moſt ordinar and moſt allow'd way of arguing in Law is by ſimilies, inſtances and parallels, and it is improper to drive thoſe into ſyllogiſmes: but he will beſt confute this way of arguing by Syllogiſmes, who will ſit down and plead any of the cauſes I have ſet down in a Syllogiſtick way, which if any man do, I ſhall renounce pleading, except he take ſyllogiſtick debating in a very large ſenſe; As for inſtance, in *Kenedies* caſe, the purſuer behov'd to ſay, *He who is guilty of forging Writes, ſhould be hang'd; but ſo it is, Kennedy has done ſo*; ergo, The Defender behoved to deny the minor, and then the purſuer behov'd to ſay, *he who is burden'd with ſuch and ſuch preſumptions, is guilty of falſhood; but* Kennedy *is guilty of theſe*; and there he behov'd to inſiſt upon all the indirect Articles or Preſumptions: but how ſhould the Defender anſwer all theſe by a *diſtinguo?* or if this way were introduced, how little would this ſhorten Debates? and are any creatures alive ſo litigious as ſome Divines, and Philoſophers, who debate only by Syllogiſmes? and ſo little do Syllogiſmes contribute to clear a Debate, that both in their Schools, and Books, ſuch as uſe Syllogiſmes muſt leave that way, and enlarge themſelves by diſcourſes, when the debate growes warm, and intricat.

Every man in pleading, gratifies his own genious, and ſome of all kind find equall ſucceſs, and applauſe; but it has been oft debated, whether pointed and ſhort pleading, wherein the Speaker ſingles out a point, and preſſes it, or full and opulent

opulent pleading, wherein the Speaker omitts nothing which may prove advantagious, be preferable: each side has its examples, and patrons.

The full and copious way pleases me; for I not only find that to have been used by *Demosthenes*, and *Cicero*, but *Plinius* assures us, that it was used by *Cæsar* and *Pompey*. At first no man was stinted amongst the Romans in his pleading, and when they were confined by *Pompey*, *qui primus frana imposuit Eloquentiæ*, the pursuer was allow'd two hours, and the defender three; but this being found thereafter too narrow; *Celicius* did allow the pursuer six houres, and the defender nine: Nor can a Pleader be interrupted in *France* (where pleading is in its greatest perfection) though he speak three full dayes; and if it be a fault, it is *peccatum felicis ingenij*, the error of great Witts, whereas short pleading is common to such as pretend to be great Spirits, and to such as really are meer dunses. Such as use to say much can contract their discourses, but few who are used to say little, could say much, though they were willing; and copious pleading is called ordinarily a fault, by such as have not the wit to commit that crime themselves. We see that in nature, the largest bodies are ordinarily strongest, the largest fruits most desired; and many stroaks do best drive in the wedge. Nature has produc'd many things for meer ornaments; and God has in his Scriptures, us'd Eloquence and Rhetorick on many occasions. But there are two Arguments which have determined me to this choice, the first is, that a short Pleader may leave things unclear, and so wrong his Client; whereas a full Pleader can only burden too much his hearers, and so wrong only himself. A narrow, and starved discourse, is like those slender and small costed bodies, which allow not sufficient room for the noble parts to exercise their functions, *Non enim amputata oratio, & abscissa, Sedlata, magnifica, excelsa, tonat, fulgurat et omnia evertit.* The next is, that even where there

there is but one Judge, it is uncertain which of all the Arguments will convince him, but where there are many, as with us, it is very well known to such as discourse in privat with them, upon what has been pleaded, that some fix upon one argument, some upon another: the best Lawyers differ oft in opinion upon debatable points, and it is great vanity for any Pleader to think, that he can certainly know what will take, and what not; this was really not an Appologie for my error, but the motive of my choice, and I find it to have been formerly used by *Plinius* the younger, (the greatest Pleader of his Age, and whose Epistles do of all other books best inform us how to plead) this great man in his 20 Epistle tells us, that *Regulus* said to him, *Tu omnia quæ in causa putas exequenda, ego jugulum statim video, hunc premo, respondi, posse fieri, ut genu esset, aut tibia, ubi ille jugulum putaret, at ego qui jugulum perspicere non possum omnia pertento.* But I will not with him adde, *Neque enim minus imperspicua, interta fallaciaque sunt judicum ingenia; Quam tempestatum, terrarumq; adjiciam quod me docuit usus, Magister Egregius, aliud alios movet, varia sunt hominum Judicia, variæ voluntates, inde qui eandem causam simul audierunt, interdum idem, sæpe diversum, sed ex diversis animi motibus sentiunt,* Our Colledge of Justice is but one body, in which the Senators are the judicative faculty, and the Advocats the inventive; and as the judgement is too rash, when it concludes before the invention has represented to it all that can be said *pro*, and *con*, even so Judges should not decide till the Advocat (who is animated by gain, applause, and custom to find out, all can be said) do first lay open all the reasons, and inconveniences which he has in his retirements prepar'd: from which also I conclude, that seing the Advocats are in place of the invention, that those Advocats who have the fertilest nvention, are most fitted for that excellent employment.

When I prefer copious pleading, I design not to commend such as are full, but of Tautologies, and Repetitions, who have

moe Periods, then Arguments, and who, providing they find many words, care not much how to chooſe them. I love a diſcourſe which is beautiful, but not painted; rich but not luxurious; harmonious but not canting. I am not for many Replyes, Duplyes, and Triplyes, but for one, or two ſtrong, full and clear diſcourſes, and to lengthen thoſe, by ſtreaching out thoſe unneceſſar plyes into one juſt meaſure. Nor do I love long pleading in the Utter-houſe, where new deciſions are not to be made, but where the old ſhould be follow'd; and where the multitude of attenders do require a ſpeedy diſpatch, and in the Inner-houſe it is only to be practiſed where the cauſe is new, and fertile, and when the Judges deſire a full information; for it is moſt unfit to vex an unwilling Judge, who will think all that he loves not to hear, meer effectation, and vanity: but envy muſt not want its objections, and where it finds not a fault, it makes one out of the next vertue; when a man pleads fully, it terms that luxuriency, and when he pleads ſhortly, it will have that paſs for ignorance, or lazineſſe: and ſo inconſiſtent are backbiters not only with the truth, but in what themſelves invent, that I have heard one and the ſame Pleader, blam'd for a too luxurient Pleader by ſome, and for a lazie Pleader by others, becauſe in the Inner-houſe he uſed the full allowance, and in the Utter-houſe he thought it impertinent to make ſpeeches, where a ſhort Defence is only neceſſary; for either the point there is clear, as ordinarily it is, and then it is abſurd to enforce a principle; or it is dubious, and then he gets the Lords anſwer, and may be full in his information; and why ſhould pains be taken to vex a Lord with debate who is not to decide?

Far be it from me to preſcribe magiſterially, a form of pleading to others, but I love to tell freely my own opinion, and if others did ſo too, we ſhould ſhortly, from comparing Notes, come to know what method were moſt allowable.

In pleading amongſt the Ancients, and yet amongſt the French, there was ſtill a Preface, and Epilogue. Amongſt them

he who ſpoke firſt, endeavoured to eſtabliſh his own opinion, and to anticipat what he thought might be urg'd by his Adverſars; but with us the Purſuer relates only the cauſe, which he is only allow'd to adorn with a pertinent repreſentation of ſuch circumſtances, as may beſt, either aſtruct the juſtice of his own purſute, or obviat unneceſſary objections in his Opponent, but without mentioning any thing *pro*, or *con*, *in jure*. Andyet I have heard the caſe ſo prudently ſtated, as that thereby the Defender was precluded from many Defences he deſign'd to propone; for amongſt able Pleaders, moſt of what is debated, ariſes from a difference rather in fact, then Law; and it is a great affront for one to plead, in Law, a long diſcourſe, which the other will grant to be all true, when the diſcourſe is ended: And yet I have heard ſome concede all was ſaid, and ſeem to difference the preſent caſe from the caſe pleaded, when indeed there was none, but when this was done meerly to evite a diſcourſe which could not be anſwered. After the purſuer has ſtated his purſute, and enlarg'd himſelf upon all the favourable circumſtances which we call the merits of the cauſe, the defender propones his defence, but urges it little, till he know if it be contraverted; but if the relevancy of the Defence be contraverted by the Replyer, in a full diſcourſe, then the Duplyer makes a full anſwer, and ordinarily theſe terminat the debate, and after that the diſcourſes become too thin and ſubtile, and the Judges weary, albeit ſome cauſes becauſe of their intricacy, or of new emergents, require moe returns.

In theſe Replyes, or Duplyes, our cuſtom allowes a ſhort Preface upon ſolemn occaſions, in which the rule ſeems to be, that theſe Prefaces ſhould not be too general and ſuch as are applicable to any Debate; as when the ſpeaker excuſes his own weakneſſe or recommends juſtice to the Judges, or ſuch common places; but it ſhould run upon ſome general principle, which though it be not a concluding Argument, yet tends much

much to clear that which is the ſubject of the Debate: as in the French pleading I have tranſlated, the Pleader being to inforce that a civil death purifies the condition, *Si ſine liberis deceſſerit*, he begins with a Preface, which ſhewes, that the Law has a great empire over nature, and plyes its events to its civil deſignes; whereas I being to plead the contrair, I do inſiſt to clear in generall, that matters of fact, eſcape the regulation of Law, and that Law is ty'd to obſerve nature.

The Diſcourſe it ſelf do's conſiſt of theſe Arguments, whereby the Defender maintains his Defence, or of theſe Anſwers by which the purſuer elids thoſe Arguments; and to range them appoſitly into their own places (ſo that ſuch Arguments as have contingency, may be ſet together) is a mark of a clear, and diſtinct wit: and when Arguments are ſo rang'd, each of them adds ſtrength to another, and they look like men well marſhal'd into diſtinct troops; whereas Arguments ſtragling out of that place where they ought to have been placed, ſeem unpleaſant, and irregular, and will hardly be expected where they are; for inſtance, in pleading againſt the Viſcount of *Stormont*, all the Arguments which can be preſs'd, are either ſuch as endeavour to prove, that the clauſe of *Stormonts* Infeftment is contrary to the nature of *Dominium* or Commerce, and after that the Pleader had paſt firſt *Dominium*, and then Commerce, to return to thoſe Arguments, which ariſe from the nature of *Dominium*, were irregular; for that were to return to ſhow what he had forgot. And from this I conclude in reaſon, that all Arguments founded upon that ſame general principle, ſhould be pleaded together, and in the ordering of theſe generalls, I would chooſe to begin with thoſe which clear beſt either matter of fact, or which tend moſt to illuminat the ſubject of the diſcourſe; and thus the controverſie in *Stormonts* caſe, being, whether the Proprietor of tailzied Lands, may alienat theſe Lands if he be prohibit to alienat by the firſt Diſponer, or at leaſt if they may be compryſ'd from

him; the first classe of Arguments to be urg'd, should be these which tend to prove, that this Prohibition is inconsistent with the nature of *Dominium*, and Propriety, for these clear best the nature of Propriety which is the chief subject of the debate.

He who answers, uses with us, to repeat the Arguments which he is to answer all with one breath; before he begin to make distinct answers to them; and this proceeds as I conceive, from the Aristotelick way of arguing in the Schools, wherein he who maintains the Thesis proposed, must repeat the Argument, before he answer it: this method I love not, for it consumes unnecessarily much time, and sure it wearies Judges to hear the same Argument twice, yea thrice, repeated; for first, the enforcer do's repeat them, then the answerer do's repeat them, both generally at the entry of his discourse; and therafter he must repeat each Argument when he is to make a special answer; and I should think it much more natural to repeat and answer each Argument a part, ordinarily the answerer follows in his answers the method of the proponer; yet sometimes he chooses rather to classe the arguments as he pleases, and to answer accordingly. If the Defender design to answer the Arguments brought against his Defence, and to adde new ones to astruct the reasonableness of his pursuit, he uses first to urge his own Arguments, and then to answer what is alleadg'd for the Defender.

Whether the strongest, or weakest Arguments or Answers should be first insisted on, was much debated amongst ancient Orators; some thought the weakest should be first urg'd, because the Judges were then freshest, and might possibly by weariness slight what was delay'd: others thought fit to leave with the Judges the strongest Arguments, that they might be fresh with them when they were to decide: this I think is arbitrary, and they are but weak Judges, who do not weigh all equally; but I think it adviseable for a young Pleader,

to

to urge the ſtrongeſt Arguments firſt, that he may thereby conciliat favour to himſelf, and raiſe the attention of his Judges, and in all caſes where the cauſe ſeems unfavourable the ſtrongeſt Arguments are firſt to be uſed, for the ſame reaſon, and there ſeems little reaſon to leave the ſtrongeſt Arguments laſt, if the Cauſe be not preſently to be decided: but where many Anſwers are to be made to one Argument, the weakeſt is ordinarily firſt made and as it were overlye, but the ſtrongeſt is reſerved laſt, becauſe it is moſt to be inſiſted upon: and I think it moſt natural to urge the weakeſt Arguments firſt, becauſe our diſcourſe ſhould like our ſelves, and like our ſtudies, grow from ſtrength, to ſtrength, and from leſs to more, but ſometimes one Argument grows from another, and then there is no place to doubt, and alwayes the moſt myſterious Argument is to be left laſt, becauſe it is to be preſumed, that then the cauſe is beſt underſtood, and myſterious Arguments come to be moſt in ſeaſon, when Judges have fully maſter'd the caſe.

The Epilogue with us is ordinarily, *In reſpect whereof the Defence ought to be admitted, or repell'd*, &c. But in ſome ſolemn caſes, the Pleader may recapitulat ſhortly his ſtrongeſt Arguments, or may urge the favour and merits of the Cauſe; and I ſhould love to preſs this merit rather here then in the preface; for favour is but an acceſſory of Juſtice, and the conſequent ſhould not preceed its cauſe.

Action, was of old one of the chief ornaments of Speech, under which was comprehended, geſture, and voice, all which were accomodated to the Orators deſign, when they ſpoke to multitudes of ignorant people, to whom, tears or ejaculations pleaded more, then reaſon did; for that they underſtood better, as more obvious to that ſenſe by which they were govern'd: but now the world is become too wiſe to be taken by the eyes, albeit I confeſſe theſe adde grace, though not force.

With

With us, action is possibly too violent, which I ascribe both to the violent temper of our Nation, *perfervidum Scotorum ingenium*, and to the way of our debate; for Fire sparkles ordinarily from the collision of two bodies, one against another, some debate for interest only, some for honour, but Advocats for both; yet hardly can he raise passion in others, who shows it not himself; and all men presume, that he who is very serious, and earnest to convince others, is the convert of his own Argument. I confess, that passion do's disorder very much the kindled speaker, and that he can hardly clear well his discourse who is himself perturb'd, and we know the design of an angry man no more, then we can see clearly the bottom of troubled waters: and therefore it were very advisable, that hot and cholerick spirits, should calm themselves before they adventure to enter upon a serious debate; but such as are bashfull are the better to be warm'd, and to loose prudently, a little of their indiscreet modesty; melancholick persons likewayes who are ready to loose themselves in their wandering thoughts, need to be a little fretted, for thereby they become intent, and finding themselves somewhat piqu'd, they are gather'd into their subject. He who fears to be interrupted, will ordinarily stammer, for he will be more busie in thinking upon the being interrupted, then upon what he is to say; and there, passion do's well also, seeing then he considers nothing but what he is speaking.

Railing, is of all other qualities, the worst in a Pleader, for it makes men judge that his cause needs it, when he rails against his adverse Client, and that he finds himself worsted, when he rails against his adverse Advocat: but some times he is obliged to sound upon matters of fact, which though they have much of reflection in them, yet are necessar truths; and sometime the Law by which he pleads, obleidges him to terms, which may seem rude to strangers, and in both these cases, not to be severe; were prevarication; though I have known Advocats very

very innocently condemn'd for calling the late times Rebellion, and ſuch as were forfeited Traitors, though in that they ſpoke their art, and were not obliged to ſpeak their thoughts: and there are few Clients, who when they looſe the Cauſe do not diſcharge a great part of their fury, upon theſe Advocats by whom they conceiv'd themſelves overthrown.

Too ſubtile ſpeading convinces few, becauſe few underſtand it, and it is applauded by few, becauſe few can reach to the practice of it; and in young men it may be interpret to be but affectation, or notionalneſſe, though in ſuch as have by long practice eſtabliſht their own reputation, it gains glory. Many citations alſo are to be avoided by all in pleading (though they are neceſſar in writing) eſpecially in young men, for in theſe they are thought but common place-wit; and yet young men do moſt uſe that way, becauſe they think thereby to ſupply their own want of authority; and becauſe they know not many parallel caſes, and are not yet ſo intimatly acquaint with the ſubject, as to draw Arguments out of its retired intrails. Many parentheſes are to be avoided, for they interrupt the threed of the diſcourſe, and make it knotty, and myſterious, though theſe weeds grow ordinarily in the richeſt ſoil; and are the effects of a luxuriant invention. Frequent repetition of the ordinar compellations, ſuch as *my Lord Chancellor*, or *my Lord Preſident*, are to be likewayes ſhunn'd.

Before I propoſe what Phraſe, or Stile is fit for a Pleader, it is fit to tell that the two uſual ſtiles known by diſtinct names, are the Laconick or ſhort ſententious Stile, and the Aſiatick, or profuſe and copious Stile; the firſt was uſed by the old Roman Legiſlators, as is clear by reading the Digeſts; but when the Empire was transfer'd to *Conſtantinople* in *Aſia*, the Empire changed its Stile with its Seat; and we find that *Proſluvium aſiaticum* in the *Codex*, and Novels. Yet all the Grecian and Roman Pleaders, even in their purity, us'd a full copious Stile, as is clear by *Demoſthenes*, *Cicero*, and others,

and

and though Legislators or Judges should use the Laconick, yea the other must still reign at the Barr. A Barrister like-wayes should rather study not to want words then to stick at the choosing fine ones, and the generality of hearers are more displeased at a gap, or breach in a discourse, then can be recompens'd by a multitude of these fine words or sentences which occasioned these gaps, whilst the speaker waited for these delicat words which he found after that stop; and as I have known many admir'd for a fluent speaking of pittifull stuff, so I have known others loose the reputation of Orators by studying in their greener years too much fineness; and I would advise my friends who begin to speak, first to study fluency, and when they are arriv'd at a consistency there, they may easily refine the large stock they have laid together.

Many who are not friends to the Barr, inveigh much at the canting terms which they say is us'd there; but these do not consider, that every Science has its particular terms, and it were pedantry to substitute others in their place; and as a man looks ridiculously in a womans habit, or a woman when attir'd like a man; a Souldiour under a Gown, or a Church-man in buff; So it is as ridiculous to hear a Member of Parliament or a Councellor speak of affairs in terms of hunting, as it is for a Lawyer to speak in his terms of other things; and I laugh as much to hear Gentlemen speak in their canting terms of hunting, hauking, dauncing, as they can do to hear me speak in the idiom of my Trade: and to speak like a Gentleman at the Barr, is to speak like a pedant; pedantry being nothing, but a transplanting of terms from what they were fit for, to that to which they are most unfit, and I love equally ill, to hear civil Law spoke to in the terms of a Stile-book, or accidental Latin, (as is most ordinar) as to hear the genuin words of our Municipal Law, forc'd to expresse the phrases of the Civil Law and Doctors.

It

It may ſeem a paradox to others, but to me it appears undenyable, that the Scottiſh idiom of the Brittiſh Tongue is more fit for pleading, then either the Engliſh idiom, or the French Tongue; for certainly a Pleader muſt uſe a brisk, ſmart, and quick way of ſpeaking, whereas the Engliſh who are a grave Nation, uſe a too ſlow and grave pronunciation, and the French a too ſoft and effeminat one. And therefore, I think the Engliſh is fit for harranguing, the French for complementing, but the Scots for pleading. Our pronunciation, is like our ſelves, firy, abrupt, ſprightly, and bold; Their greateſt wits being employ'd at Court, have indeed enricht very much their Language as to converſation, but all ours bending themſelves to ſtudy the Law, the chief Science in repute with us, *hath* much ſmooth'd our Language, as to pleading: and when I compare our Law with the Law of *England*, I perceive that our Law favours more pleading then theirs does, for their Statutes and Deciſions are ſo full and authoritative, that, ſcarce any Caſe admits pleading, but (like a Hare kill'd in the ſeat) it is immediatly ſurprys'd by a Deciſion, or Statute. Nor can I enough admire, why ſome of the wanton Engliſh, undervalue ſo much our idiom, ſince that of our Gentry differs little from theirs, nor do our commons ſpeak ſo rudely, as theſe of *Yorkſhire*: as to the words wherein the difference lyes, ours are for the moſt part, old French words, borrowed during the old League betwixt our Nations, as *Cannel*, for *Cinnamon*; and *ſervit*, for *Napkin*; and a thouſand of the like ſtamp; and if the French Tongue be at leaſt equal to the *Engliſh*, I ſee not why ours ſhould be worſe then it. Sometimes alſo our firy temper has made us for haſt, expreſſe ſeveral words into one, as *ſtour*, for *duſt in motion*; *ſturdy*, for *an extraordinar giddineſs*, &c. But generally, words *ſignificant ex inſtituto*, and therefore, one word is hardly better then another; their Language is invented by Courtiers and may be ſofter, but ours by learn'd men, and men of buſineſſe, and ſo muſt be more maſſie and ſignificant: and for our pronunciation, beſide what I ſaid formerly of its be-

ing more fitted to the complexion of our people, then the Engliſh accent is; I cannot but remember them, that the *Scots* are thought the Nation under Heaven, who do with moſt eaſe learn to pronounce beſt, the French, Spaniſh, and other Forraign Languages, and all Nations acknowledge that they ſpeak the Latin with the moſt intelligible accent, for which no other reaſon can be given, but that our accent is natural, and has nothing, at leaſt little in it that is peculiar. I ſay not this to aſperſe the Engliſh, they are a Nation I honour, but to reprove the petulancy, and malice of ſome amongſt them, who think they do their Country good ſervice, when they reproach ours.

——*Nec ſua dona quiſque recuſet.*

I know that *Eloquence* is thought to have declin'd from *Cicero's* time, and it has ſo indeed, if with pedants, we make *Cicero* the Standart, for nothing can be ſtraighter then its ſquare; but I conceive that the world do's like particular men, grow wiſer and learneder, as it grows old; but of all things Eloquence ſhould improve moſt, becauſe of all things it ripens moſt by practice; experience diſcovers daily more, and more of the humour of ſuch whom we are to convince; and the better we know them, we can convince them the eaſier. By experience alſo we learn to know, what forms, and ſounds pleaſe moſt, and every Pleader and Orator adds ſome new inventions to that of the laſt Age, and if one being added to twenty make twenty a greater number, then the Eloquence of this Age, being added to that of the former, muſt make this Age more eloquent then the laſt. But I know ſuch as envy the Orators of the preſent Age, do ſtill endeavour to mortifie them, by admiring ſuch as are dead, who in their time met with the ſame meaſure; death alſo removes men from being our rivals, and ſo from being envy'd by us; yet we ſhould remember, that even *Cicero*, and *Demoſthenes* did complain of the ſame in their Age, though they far exceeded their predeceſſours.

Some may think that the Eloquence of *Rome*, and others behov'd to be higher then ours, becauſe the multitude were in

theſe

theſe Common-wealths abſolutely govern'd by it, and the greatneſs of their reward for Eloquence, exceeding ours, their Eloquence behov'd to do ſo too. But I am formally contrary, for ſince our Judges are wiſer, and more learn'd then the commons, there muſt goe more art to convictions now, then was requiſite then, and though we have not Kings, nor Common-wealths to defend, as thoſe oſtimes had, who pleaded in the Roman Senat; yet we may ſhow as much Eloquence upon leſſer occaſions, as one may cut finer figures upon Steel, then upon Gold; it is the intricacy of the caſe, and not the greatneſs of the pryze, which makes the value of the pleading, and generous Spirits are more animated by difficulty, then gain. We have alſo moe Laws, Parallels, and Citations to beautify our diſcourſe, then they had, and want none of their topicks; ſo that though our ſpirits did not equal theirs, yet in our pleadings we could not but exceed them. Nor do I value much the opinion of thoſe, who think the Spirits of ſuch as liv'd in Common-wealths were greater, becauſe freer then ours, who live under Monarchies, and being ſubiects to none, they had greater confidence then we can have. This is but a fancy, invented by ſuch as live under that form of Government: but I have not ſeen any Switzer, or Hollander, ſo Eloquent as the Engliſh, or French; and it enlivens me more to ſee Kings, and Courts, then to ſee theſe buſie, and mechanick Nations: nor can I think any ſpirit can excell much in any one thing, where equality is deſign'd, and where all ſuch as offer to riſe above the vulgar, are carefully depreſt, and ſunk down to a level, as they are under Common-Wealths.

For my own part, I pretend to no bayes; but ſhall think my ſelf happy, in wanting, as the fame, ſo the envy which attends Eloquence: and I think my own imperfections ſufficiently repay'd by fate, in that it has reſerv'd me for an Age, wherein I heard, and dayly hear, my Collegues plead ſo charmingly, that my pleaſure do's equal their honour.

A Pleading translated out of French, *to inform such as understand not that Language of the way of Pleading there.*

An Estate in Land being dispon'd to a Woman, and another being substitute, in case she should die without children of her own body, She being condemn'd for incest, and burnt only in Effigie, the question is, Whether by that civil death, the condition be purified, as well as if she were naturally dead, and if the person substitute hath by that civil death, right to the Estate, without waiting for her natural death.

In favours of the person thus substitute, it was Pleaded.

ALbeit matters of Fact do depend intirely upon Nature, and cannot submit themselves to the authority of politick Laws, *Ea quæ sunt facti, nulla constitutione infecta fieri possunt*; yet Law considers them only in so far as they are necessar and usefull for humane Society, and upon that account forces this Maxim to suffer many exceptions. Thus *bonæ fidei possessor*, is *per actionem publicianam*, made to have right by an imaginary and fictitious possession, to that which he never really possessed. *Jus postliminii*, makes us believe him who

is a prisoner of War, never to have been taken prisoner. And *Lex Cornelia* doth presume, that these who did test whilst they were captives, did dye in the City to which they belonged, though they dyed really abroad in their captivity. All which instances prove, that the Law doth not subject it self blindly to Nature, but that it can ply matters of Fact to its own designs, and can by an innocent cheat, adjust them to publick utility and advantage.

This foundation being thus establish'd, let us examine this condition (if she dye without children) and let us try if it be so bound up to a matter of Fact, as that it cannot submit it self to the just and politick fictions of the Law.

It is certain, that albeit all Conditions be ordinarily meer matters of Fact, yet this Condition which depends entirely upon the intention of the Testator, must owe its form to his will; and seing he did fix his first desires and designs upon this Woman and her Heirs, and did call the person substitute for whom I plead, but in the third place, not to suspend and differr his liberality, but to obliege my Client to wait, because she and her Heirs did preceed them in the order of his inclinations: therefore, when Death or Fortune do state her and her Heirs in such a condition, that neither of them can expect the succession, there is no doubt but his will doth immediatly transport the effects of his liberality to the person substitute, since the persons who should preceed them, are by the Law removed out of the way. Nor was it the intention of the Testator to enrich the Fisk any more, then if he had adjected a condition relating nothing to the purpose, *Veluti, si Navis ex* Asia *venerit*. From this likewayes it follows, that as succession is one of the wayes whereby we acquire in Law civil Rights which depend upon the Law, and which the Law doth not allow to any but to its own Citizens, *Qui habent Testamenti factionem passivam*; So this condition, *Si sine Liberis decesserit*, is not so entirely and absolutely a matter of Fact, but that Law and Fact are therein

mixed

mixed together; and therefore, albeit the death of the first Heir without Children, is regularly understood according to the proper and natural signification of natural Death, yet Lawyers have extended this to civil Death, and have purifi'd the condition by deportation and other kinds of civil Death. As is clear, *l. ex facto*, 17. § *ex facto*, *ff*: *ad senatusc. trebel. Ex facto tractatum memini, rogaverat quædam mulier filium suum, ut si sine liberis decessisset restitueret hæreditatem fratri suo, is postea deportatus, in insulam liberos susceperat; quærebatur igitur, an fidei commissi conditio deficisset, nos igitur hoc dicemus, conceptos quidem ante deportationem, licet postea edantur efficere, ut conditio deficiat: post deportationem vero susceptos, quasi ab alio, non prodesse, maxime cum etiam bona cum sua quodammodo causa fisco sint vindicanda.*

This woman is condemn'd to be burn'd and strangl'd, she had no Children, and can expect no divorce; her flight has not only banish'd her out of the Kingdom, but that sentence that has reveng'd her crime on her memory, and picture, has rendered her *servam pœnæ*, the unfortunat prey of an unfamous Gibbet; How can she then but be repute dead, seeing she is expung'd out of the number of Subjects? and how can that Law which has execute and kill'd her, belye so far its own Authority as to believe her alive, after it has taken so much pains to make us believe she is dead? and after her civil death, how can it conserve for her a faculty of bearing Children, which may fulfill a civil condition? I confess that deportation is not still compar'd to natural death, and that the liberty which a banish'd man carry's with him to a forraign Countrey, do's preserve for him all the advantages of the Law of Nations, *Ita ut ea quæ juris civilis sunt, non habeat, quæ vero juris gentium sunt habeat, l. 17. ff. de pœnis.* But on the contrary, since the being a slave devests man of his humanity, and ranks him amongst beasts, *l. 2. §. 2. ff.* ad *l. aquil.* the Law can no more consider him, but as a piece of moveables, living and animated

animated, as a reaſonable tool belonging to his Maſter; So that having no head, nor will, but his Maſters, therefore if the Law allow him to fulfill any condition, that is upon his Maſters conſideration, and not his own. A perſon condemn'd is the ſlave of his puniſhment, *Servus pœnæ, magis enim pœna quam fiſci ſervus eſt*, l. 12. *ff. de jure fiſci:* and therefore, the Law reputes him dead, ſince that Gibbet to which it tyes him can communicat nothing to him, but a cruel death, and conſequently he can fulfill no condition, *l.* 17. §. *Si quis rogatus ad ſenatuſc. trebel. Si quis rogatus fuerit filiis ſuis, vel cui ex his voluerit reſtituere hæreditatem* Papinianus, l. 8. *reſponſorum etiam deportato ei tribuit eligendi facultatem; cui liber factus fidei commiſſum reſtitui velit, ſed ſi ſervus pœnæ fuerit conſtitutus, nullo ante concepto filio, jam parere conditioni non poterit deceſſiſſeque ſine Liberis videtur; ſed cum decedit electionem illam quam* Papinianus *deportato dedit, huic dari non opportet.*

Law imitats Nature, and uſes the ſame authority over a man, as he is ſociable, that Nature exerciſes over him, as he is natural: And hence it is, that the Law governs and regulats Societies for its own advantage, and as it can beget Children, and people Families by Adoptions; So by the ſame power it can cut off unneceſſary members from Families by exhereditations, and can kill them by condemnatory ſentences, *Servus pœnæ in omni jure, verè ac ſemper ſimilis eſt mortuo:* Cujac. obſer. l. 3. cap. 10. Law, then may juſtly bury a Criminal in the unfamous ſepulchre of a cruel ſervitude, which takes from him his civil life with his liberty, and can tye him to a long death and exceſſive torment, which may draw out his torture to a very long continuance, and make him, as *Petronius* ſpeaks, paſs but for the pitiful viſion, and horrid ſhadow of his own perſon.

We muſt then confeſs, that that Sentence which confiſcats his Body and Goods, doth at the ſame time confiſcat his Perſon and Liberty. It is the Sentence which kills him, and his natural death following thereafter doth but execute that Sentence;

and

and as we say, that a Robber has kill'd a Passenger when he gave him the mortal wounds, though he did not then dye, *Tunc occidisti cum vulnerabas*, l. *si ita ff. ad* l. *aquil.* So by the same reason, the Judge doth kill a Criminal the very moment that he pronounces the Sentence, and he truly dyes by the Sentence, and not by the Execution, *l. 29. ff. de pen. Qui ultimo supplicio damnantur statim & civitatem, & libertatem perdunt, itaque præ-occupat hic casus mortem, & nonnunquam longum tempus occupat, quod accidit in personis eorum, qui ad bestias damnantur, sæpe etiam adeo servari solent post damnationem, ut ex his in alios quæstio habeatur.* And as the authority of the Law may beget a Citizen before his birth, and receive a Posthume into the Common-wealth before he come out of the womb, *Posthumus pro nato habetur*: So its Empire may take away the life a long time before a man die. It may preveen his death, and chase him out of the world before death overtake him, which is likewayes confirmed *per l. si quis 6. §. Sed & si quis ff. de injust. sed & si quis fuerit capite damnatus, vel ad bestias, vel ad gladium; vel alia pena quæ vitam adimit, testamentum ejus irritum fiet, non tunc cum consumptus est, sed cum sententiam passus est, nam pena servus efficitur.* Let us now see if this way of reasoning drawn from the Roman customs, can be brought home to our French Practique.

Lawyers who designed to found the principles of their true Philosophy, upon maxims, real, solid, and constant, were too clear-sighted to force their Lawes to discharge their revenge upon an Image, and an Apparition, to take the shadow for the Body, and in supposing the name of a Criminal for his person, thereby to challenge their Judges of want of power and precipitancy; and therefore they did not allow, that a person who is absent should be condemn'd, and that the Law should in vain spend its thunder upon those whom it could not reach: *l. 1. ff. de requirend: reis.* Since then the Law of the Romans, could not condemn capitally a Criminal who was contumacious,

cious, it was easie to them to believe that a prisoner who was present and fetter'd, did instantly receive that death to which he was condemn'd But since our Statutes ordain a painted and imaginary execution, either our Statutes and Customs must confess their weakness, and quite these as a meer mumries, or els they must necessarily obliege us to believe these appearances to be realities, and essay to verifie these civil lyes, in forcing us to believe that these painted executions are real; that the originals of those infamous pictures are no more alive, and that *res judicata pro veritate habetur.*

If the power of a Roman Pretor was sufficient to beget a child in spight of truth, and nature it self, *Plane si denuntiante muliere, negaverit ex se esse pregnantem, tametsi custodes non miserit, non evitabit quominus quæratur, an ex eo mulier pregnans sit, quæ causa si fuerit acta apud Judicem, & pronuntiaverit cum de hoc agetur, quod ex eo pregnans fuerit nec ne in ea causa esse ut agnoscere debeat, sive filius non fuit sive fuit, esse suum*, l. 1. § ult. ff. *de agnosc. liber.* or may force a Mother to disown her Child, which is really hers; *Sive contra pronuntiatum fuerit, non fore suum, quamvis suus fuerit, placet enim ejus rei Judicem jus facere*, l. seq. ff. *eod.* By much more reason, may a general Law and Custom universally receiv'd, force subjects so far to obey their Judges, as to believe that a woman strangled and burnt has lost her life upon the scaffold, where she has been so publickly and tragically executed.

It is then more just to presume, that this Woman who is condemn'd is dead without Children, and that her execution has purify'd the condition, then that the pursuer should attend her death, should search out her wandering person, which lurks under so much shame, and pursue her in her flight and banishment through Countries, which are either unknown, or in enmity with ours; and therefore I conclude, that it is most just to put the pursuer in possession of the Estate.

I have essayed thus to answer the former Pleading, because there is no Answer to it extant in the French, *and because such Cases may with us frequently occurr.*

THe greatest glory of Art is, that it can imitate Nature; and every thing which forces Nature, is hated by men, as folly and affectation; but amongst all those Arts which follow Nature, Law is the chief, for it being the chief product of Reason, it endeavours most to resemble Nature, Reason and Nature being in man the same thing vary'd under diverse expressions, and Reason being mans Nature. And thence it is, that the Law plyes all its constitutions to the several degrees of Nature, and observes it exactly before it begin to form a Statute relating to it, *Propter naturam statuitur aliter, quam statueretur alias*, gl. ad. l. Julianus, ff. *si quis omissa causa*; though it appoints that consent should obleidge, yet it excepts Minors, because of the frailty of their Nature; though it appoints murder to infer death, yet it pardons such as are Idiots, or furious; it doth in dubious cases prefer that interpretation which is most suitable to the nature of the thing contraverted, it presumes *illud inesse, quod ex natura rei inesse debet*: and it has very well ordain'd, that *ea quæ dari impossibilia sunt, vel quæ in rerum natura non sunt, pro non adjectis habentur*, l. 135. ff. *de reg. jur.* Since then there is nothing so unnatural

as

as to force us to believe, that a person who is really alive, is truly dead, and that the Children which a woman may bring forth shall not be her Children; I see not with what appearance of succesſe the Substitutes can in this case aspire to the succession now craved. Nature has a fixt beeing, and men know what it determines by consulting their own breasts, and think themselves happy under the protection of what is sure, and determin'd; but if it were allow'd that Law might vary, and that Lawyers might invent such fictions as these, and by them impose upon others, who not being of their profession could not follow all their subtilties, and windings; then Law should become a burden, and be esteem'd an illusion. And I imagine I hear those amongst whom this woman lives, laugh at this discourse, which would force them to believe that she is dead; and I am sure that any country-clown may refute it, by presenting the woman, as one refuted a wise Philosopher, who maintain'd, *That there was no motion*, without any other Argument, then by walking up and down.

The question then being, whether the condition, *si sine liberis decesserit*, is purified by a civil death, and if immediatly after she is burnt in effigie, she can be said, *sine liberis decessisse*, so that the person substitute may immediatly succeed, and exclude any Children she shall thereafter bear, or if the Substitute must attend her natural death.

That the Substitute cannot succeed immediatly after her being burnt, but that any future children would seclude him, so that a natural only, and not a civil *death*, purifies the condition, is contended by these reasons; First, the question being, Whether this condition, *si sine liberis decesserit*, respects natural, or civil death; we must interpret the word *death*, so as that we follow the more genuine and natural signification; and I am sure, the ordinary and genuine interpretation of *death*, is a natural and not a civil *death*. 2. If we look to the meaning of the Disponer, which is the next rule to be follow'd in

the interpretation of dubious and equivocal words, we will find, that it is hardly imaginable, that the Disponer dream'd of a civil *death*; and it is most certain, that any man, especially who was not a Lawyer, would never have figur'd a civil death; nor is it deny'd, for *fictio* is *mens Legis*, *non disponentis*. But how unsuitable were it to natural equity and the principles of Law, that the will of the Disponer should not regulat what is dispon'd? or why should the Law dispose upon what it did not bestow? 3. Words are to be explain'd in a Disponers Will, as the Disponer would probably have explain'd them himself, if the meaning had been contraverted at the time of making the Disposition; But so it is, that if it had been proposed to the Disponer, whether the Children of the woman institute should be cut off, in case their Mother should commit a crime? It is probable that he would not have punished poor Infants, for a guilt to which they were not accessory; and the Law was never more generous, then when it said, *Non competere beneficium inofficiosi testamenti post-humis, cum exhæredationis causam comittere nequeant, nec debent alieno odio prægravari*, l. 33. §. 1. C. *de inoff. test.* Nor is it imaginable, that the Testator would have taken from them what he designed, because they fell, without their own guilt, in a condition, which made that which was but liberality to become charity: and since he designed this for their Mother and them, to supply their wants, it is not imaginable he would have taken it from them, when their wants were greatest. The Children would likewise still continue to be nearer to the Disponer, then the Substitute, *Nam jura sanguinis nullo jure civili adimi possunt*; and since the blood-relation gave at first the rise to that nomination, it is probable, that the effect would not be taken away whilst the cause continued. 4. If she can have Children after her being burnt in effigie, she cannot be said *decessisse sine Liberis*, upon her being burnt in effigie; but I substume that she may have Children, and such too as the Law would acknow-

acknowledge to be Children: for by the 22. *Nov.* cap. 8. Marriage is declar'd ſtill to ſubſiſt, notwithſtanding of any interveening criminal ſentence, for though by the old Law, condemn'd perſons *pro nullis habebantur*, and ſo the Marriage was diſſolved, yet by that excellent Conſtitution this was abrogat, *Si enim ex decreto judiciali, in metallum aliquis, aut vir, aut mulier, dari juſſus eſſet, ſervitus quidem erat & ab antiquis Legiſlatoribus ſancita & ex ſupplicio illata, ſeparabatur vero matrimonium, ſupplicio poſſidente damnatum, ſibique ſervientem. Nos autem hoc remittimus, & nullum ab initio bene natorum ex ſupplicio permittimus fieri ſervum, neque enim mutamus nos formam liberam in ſervilem ſtatum, maneat igitur Matrimonium hoc nihil tali decreto læſum.* Since then her husband continued to be ſo ſtill, and that the Law would acknowledge the Children to be hers, would not the Law contradict it ſelf, if it ſhould ſay that ſhe died without Children, and yet ſhould acknowledge that theſe were her Children? 5. *Poſt-humus pro jam nato habetur, ubi de ejus commodo agitur*; and therefore, by the ſame reaſon of juſtice and equity, the Law ſhould be ſo far from preſuming, that there can be no Children born after the mother is condemned, that if ſhe ſhall bear any, it ſhould rather preſume them to be already born, to the end they may not be prejudged of the ſucceſſion which would be otherwiſe due to them; and if *poſthumus habetur pro jam nato, ubi agitur de ejus commodo*, much more ſhould he be preſumed *natus*, *ubi agitur de damno vitando*; for we are much more favourable in *damno vitando, quam lucro captando.* 6. By the Roman Law, *auth. bona damnatorum, C. de bon. preſcript.* the Goods of condemn'd perſons were not confiſcat in prejudice of the aſcendents, or deſcendents, to the third degree, except only in the caſe of *leſe-majeſtie.* If then the crime be not able to ſeclude Children, it follows neceſſarily, that Children *quo ad* their ſucceſſion, are in the ſame caſe as if the crime had not been committed, and if the Mother had committed no crime, here there had

had been no place either for the Substitute, or for this question. It is just that *delicta suos debent tenere authores*; and that since punishment is only justified by the preceeding guilt, that the punishment should not exceed the guilt, and that the right designed for the Children by the first Disponer, should not be taken away from them by the Mothers fault: this were also to adde affliction to the afflicted, to make poor Infants loose with their Mother, their patrimony, and to impoverish them most, at an occasion, when to give them were charity.

I confesse that Law sometimes doth recede from Nature, and invents pretty fictions, as in the cases propos'd of *jus postliminij*, *adoptionis*, and *Legis Corneliæ*; but it doth so, very sparingly; nor are these fictions ever allow'd, except where they are introduc'd by an expresse Law; for the Law thought it not reasonable to allow every Judge or Lawyer a liberty to coin his own caprice into a fiction, lest so, unreasonable fictions might be introduc'd, and lest the people might be ignorant of what they were to follow. Since then the pursuer founds his strongest Argument upon this as a priviledged fiction, he must instruct that this fiction is founded upon expresse Law, and even in these fictions, Law never inverts Nature, but rather seconds it, and it makes not Nature bow to these, but these to Nature; and amongst many other instances, this is clear by adoptions, wherein the younger cannot adopt the elder, because it were against Nature saith the Law, that the younger should be father to the elder, *Inst. de adopt.* §. 4. *Minorem natu majorem non posse adoptare placet, adoptio enim naturam imitatur, & pro monstro est, ut major sit filius quam pater.* And I may by the same reason say, that it were monstruous to imagine, that she who may really labour in child-birth, and who really may give suck cannot bring forth a child, but is dead; and that the Law should not own as children, these whom the Church owns as such. And in these fictions which are allow'd, we will find upon exact inquiry, that Law has not designed to over-

turn

turn Nature, but only has made bold by theſe fictions to diſpenſe with ſome of its own ſolemnities, as is clear by the Law *Cornelia*, wherein the Romans did by that legal fiction imagine, that he who died in priſon amongſt the enemies in a Forreign Countrey, died at *Rome*, and at freedom, meerly that they might by that fiction render valid the Teſtament of him who was a priſoner, for the honour of their Common-wealth; and whoſe Teſtament could not have ſubſiſted without this fiction, ſeing none but a free citizen could amongſt them make a Teſtament. Since then there is no need of ſuch a fiction as this, and ſince there is no expreſſe Law introducing it ſpecifically in this caſe, there is no reaſon that it ſhould be allowed to take away the benefit of the Diſpoſition from the perſon Subſtitute, which it gave not. *Nihil tam naturale* (ſayes the Law) *quam eo genere quidq; diſſolvere quo colligatum eſt*, l. 35. ff. *de reg. jur.* Since then the Children owe not their ſucceſſion here to the civil Law, but to the will of the Diſponer, the Law ſhould not by its fictions, take away what was not at firſt the effect of its liberality.

In the caſes where the Law allow's fictions, it allow's them only for to ſtrengthen natural equity, and not to overturn it, and by the definition given of it, it is ſaid to be *indubitata falſitatis pro veritate aſſumptio, in caſu poſſibili, & ex juſta cauſa proveniens, ad inducendum juris effectum equitati naturali non repugnantem. Faſon. ad* l. *ſi is* ff. *de uſu-cap*: Upon which definition no ſubſumption can be founded here, for not only is not this in *caſu poſſibili*, becauſe it is impoſſible, that a perſon can be both dead and alive at once, and that Children ſhould be, and not be, *Verum eſt, neque pacta, neque ſtipulationes, factum poſſe tollere, quod vero impoſſibile eſt, neque pacto, neque ſtipulatione poteſt comprehendi*, l. 32. ff. *de reg. jur.* But it is alſo repugnant to juſtice and equity, that the Eſtate deſtinat by the Diſponer to his blood-relations ſhould be taken from them, and given otherwiſe then he would have beſtowed it himſelf; and though the Law doth ſometimes in favours of Children, obliege

obliege us to believe, that the Child that is in the Mothers womb is born, there is ſome foundation for impoſing that upon us, ſince there is a Child extant though not born; yet it never uſes that liberty in puniſhing poor Infants, and to condemn them before it can know them, or that they have tranſgreſſed.

In anſwer to the ſecond claſſe of Arguments, I do confeſſe, that it is true, that all Civil Rights ſhould periſh by a criminal Sentence, and that *in ſenſu civili, pro nullo habebatur damnatus*; but it is as true, that *ea quæ ſunt juris naturalis* were not thereby taken away, *quod attinet ad jus civile, ſervi pro nullis habentur, non tamen et jure naturali, quia quod ad jus naturale attinet omnes homines æquales ſunt*, l. 32. ff. *de reg. jur.* But ſo it is, that to bear Children is in her no effect of the Civil Law, but of the Law of Nature, and the Children to be procreat by her, will be her Children by the Law of Nature; ſo that ſince ſhe can bear Children, ſhe can yet fulfill the condition of the inſtitution; nor can ſhe be debarr'd from that by being *ſerva pœnæ*, at leaſt her Children cannot, ſeing they are not condemned by her Sentence: condemnatory Sentences take only from the perſon condemned what may belong to the fisk, for it ſubſtitutes the fisk in place of the perſon condemned, but it takes not from him what cannot belong to the fisk. *Ea ſola deportationis ſententia aufert, quæ ad fiſcum perveniunt*; But ſo it is, that it was never deſigned, that the fisk ſhould ſucceed in place of the perſon to whom the Diſpoſition was made, as is acknowledged by the Subſtitute who now craves preference; and if the fisk would be preferr'd to the womans Children, much more would he be preferr'd to their Subſtitutes, who ſucced only to them. And the reaſon of the deciſion, *l. ex. facto. ff. ad. ſc. trebel.* is not founded *in odium* of the Children, but of the fisk, *Maxime cum etiam bona, cum ſua cauſa fiſco ſunt vindicanda.* But the ſolid anſwer to that, and all theſe other Laws, is, that by the old Roman Law, *damnatus erat ſervus pœnæ, & ſervus pœnæ parere conditioni non poterat, & pro nullo habebatur*; and therefore, by

by that Law, *parere conditioni non poterat*, as is clear by the Law cited: but *Justinian* did abrogat that amongst many other unreasonable fictions, and by *nov.* 22. *cap.* 8. this *servitus pœnæ* is clearly abrogated, and therefore since the foundation of the decision is taken away, the decision can now no longer take place, and by all the Laws in Christendom, those servitudes are now abrogated; and our blessed Saviour has by his coming to the world, set mankind at liberty in all respects, and we can be slaves to nothing now, but to our vices. Nor doth the Law look upon a person condemned, as a dead person, in all respects, which is the third great foundation of all that is pleaded against my Client; for it allowes her to propone her just defences, and it would punish him who kill'd her upon a privat revenge; it would acknowledge her Children to be lawfull, and untill she be really dead, her husband could not marry another. for though the Law, to deterr men from committing crimes, doth oftimes raise its terrors by civil fictions, yet it is the nature of these civil fictions, that they cannot be strech't *de persona in personam*; though then it will not allow such to be thought still alive who are struck with it's Thunder, yet this fiction reaches only to the offender, in so far as concerns her civil capacities, and the punishment of her guilt; and therefore seing the blood is not tainted by this Sentence, she not being here condemn'd for treason, which is the only crime that taints the blood, her Children, though born after the Sentence, would still succeed to her, and since they would be acknowledged to be her Children, she cannot be said *decessisse sine Liberis*: which is the condition upon which the Substitute craves to be prefer'd.

The Parliament of Burgundy *found, that a natural death could only purifie this condition*, Si sine liberis decesserit.

For *Haining*, againſt the Fiſhers upon *Tweed.*

FIRST PLEADING.

How far a man may uſe his own, though to the prejudice of his neighbours.

Haining being prejudged by a Lake which overflowed his Ground, and which by its nearneſs to his Houſe, did, as is ordinar for ſtanding Waters, impair very much the health of his Family: He did therefore open the ſaid Lake, whoſe Waters being received by *Whitticker*, did at laſt run with *Whitticker* into *Tweed*. The Fiſhers upon that River, pretending that the Water which came from that Lake, did kill their Salmond, and occaſion their leaving the River, do crave that *Haining* may be ordain'd to cloſe up that paſſage. This being the ſtate of the Caſe, it was alledged for *Haining*,

That ſince men had receded from that firſt community, which ſeem'd to be eſtabliſh'd amongſt them by Nature, the Law made it its great task, to ſecure every man in the free and abſolute exerciſe of his Property, and did allow him to uſe his own as he thought fit, and whatever did leſſen this power and liberty, is by the common Law term'd a ſervitude, or ſlavery: nor can a ſervitude be impoſed upon a man without his own conſent, and ſuitably to this principle, every man may raiſe his own houſe

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as high as he pleaſes, though he ſhould thereby obſcure the lights of his neighbours houſe: or if I ſhould abſtract from my neighbours Ponds, that Water which formerly run into them from my Lands, the Law doth not think him prejudged, nor me oblieged to prefer his conveniency to my own inclinations, as is clear by *l. 26. ff. de damno infect.* For as that Law very well obſerves, He is not prejudged who looſes a benefit which flow'd from him who was no way tyed to beſtow it, *l. 26. ff. de dam. infect.* Proculus *ait, Cum quis jure quid in ſuo faceret quamvis promiſiſſet damni infecti vicino, non tamen eum teneri ea ſtipulatione: veluti ſi juxta mea ædificia habeas ædificia, eaque jure tuo altius tollas, aut ſi in vicino tuo agro cuniculo, vel foſſa aquam meam avoces. Quamvis enim & hic aquam mihi abducas, & illic luminibus officias, tamen ex ea ſtipulatione actionem mihi non competere:* ſcil. *quia non debeat videri is damnum facere, qui eo veluti lucro quo adhuc utebatur, prohibetur: multumque intereſſe utrum damnum quis faciat, an lucro, quod adhuc faciebat, uti prohibeatur.* And if I dig a Well in my own houſe, which may cut off thoſe paſſages whereby Water was conveyed to my neighbours Well, one of the greateſt Lawyers has upon this caſe, reſolved, that my neighbour will not prevail againſt me; *For,* ſaith he, *no man can be ſaid to be wrong'd by what I do upon my own ground, for in that I uſe but my own right;* l. 24. § 12. *ff. eod. In domo mea puteum aperio quo aperto venæ putei tui præciſæ ſunt, an tenear? Ait* Trebatius, *Me non teneri damni infecti, neque enim exiſtimari operis mei vitio damnum tibi dari, in ea re, in qua jure meo uſus ſum:* where the gloſs obſerves, that *in ſuo quod quiſque fecerit, in damnum vicini id non animo nocendi facere preſumitur.* And if by a Wall or Fence upon my Land, the Water was kept from overflowing my neighbours Land, I may throw down my own Fence, though my neighbours Land be thereby overflowed, *l. 17. ff. de aqua pluvia;* And therefore, ſeing the ground doth belong to *Haining*, and that the Fiſhers of *Tweed* have no ſervitude upon him, he may uſe

his own as he pleaſes, eſpecially ſeing he doth not immediatly ſend his Water into *Tweed*, but into another Rivolet, which carryes it very far before it doth diſgorge there. So that if the Fiſhers upon *Tweed* did prevail againſt *Haining*, they might likewiſe prevail againſt all, from whoſe ground any Moſs-water runs into *Tweed*, though at fifty miles diſtance; and they may forbid all the Towns from which any water runs into *Tweed*, to throw in any excrements, or any water employed in Dying, leſt it prejudge their Salmond-fiſhing; whereas, *Alteri prodeſſe, ad liberalitatem, non ad juſtitiam pertinet.*

It is (my Lords) referr'd to your conſideration, that publick Rivers have been very wiſely by providence, ſpread up and down the world, to be eaſie, and natural Vehicles for conveying away to the Sea, (that great receptacle of all things that are unneceſſar) excrements, and other noxious things, which would otherwayes have very much prejudg'd mankind; and that they may the better perform this office, Providence has beſtow'd upon Rivers, a purifying and cleanſing quality, ſo that after a little time, and a very ſhort courſe, all that is thrown in there, doth happily looſe their noxius nature, which is waſht off by the ſtreams by which they are carryed.

Rivers are natures high-wayes by Water, and we may as well forbid to carry any thing which ſmells ill, upon our high-wayes by land, as we may forbid to throw in ſtinking Waters into our Rivers. The proper uſe of Rivers is, that they ſhould be portable, and fit for navigation, or for tranſporting things from on place into another; and Salmond-fiſhing is but an accidental caſuality, and therefore the only interdicts, or prohibitions propon'd by the Law, relating to publick Rivers are, *Ne quid in flumine ripave ejus fiat, quo pejus navigetur*, tit. 12. lib. 43. and, *ut in flumine publico navigare liceat*, *tit.* 14. *ff. eod. lib.* But in Rivers that are not navigable, the Law has forbidden nothing, but that their courſe and natural current be not alter'd, *Ne quid in flumine publico fiat, quo aliter fluat aqua, atque*

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uti priore eſtate fluxit, tit. 13. ibidem. So that ſince the Law doth not forbid the throwing in any thing into publick Rivers, It doth allow it; for it is free for every man to do what the Law doth not prohibit, and if upon ſuch capricius ſuggeſtions, as theſe, men were to be reſtrain'd from uſing their own, no man ſhould ever adventure to drain his Land, to open Coal-ſinks, or Lead-mines, or to ſeek out any Minerals whatſoever, whoſe waters are of all other the moſt peſtilentious, becauſe after he had beſtowed a great deal of expenſe, he might be forc'd to deſiſt, for ſatisfying the jealouſie, or imagination of melancholy, or avaritious neighbours. And if this purſute find a favourable hearing, malice and envy will make uſe of it, as a fair occaſion whereby to diſturb all ſucceſsfull, and thriving undertakers. But your Lordſhips may ſee, that the world, both learn'd and unlearn'd, have hitherto believ'd, that ſuch a purſute as this would not be ſuſtain'd, in that though intereſt and malice did prompt men to ſuch purſutes, yet not one ſuch as this has ever been intented, for ought I could ever read, ſave once at *Grenoble*, where an Advocat did purſue a Smith to tranſport his Forge from the Chief-ſtreet, becauſe it did by its noiſe diſturb not only him, but the people who frequented that ſtreet; from which purſute the Smith was abſolv'd, as *Expilly* obſerves in his Pleading.

Yet, my Lords, the Fiſhers upon *Tweed* want not ſome apparent reaſons which give colour to the purſute; and it is urg'd for them, that no man is ſo Maſter of his own, but that the Common-wealth has ſtill an intereſt with him in it, and Law being invented to protect the intereſt of Societies, as well as to ſecure the property of privat perſons, therefore though every privat man inclines to ſatisfie his own humour, and advantage, in the uſe of what is his own, yet it is the intereſt of the Common-wealth, that he do not abuſe his own property; and therefore it is, that the Law doth interdict prodigalls; nor will the Law ſuffer that a man uſe his own *in-*

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emulationem alterius, l. 3. ff. *de. oper. pub.* and a man is said to do any thing *in emulationem alterius*, when others looſes more by what is done, then the Proprietar can gain: As in this caſe, though *quilibet poteſt facere in ſuo*, yet *non poteſt immittere in alienum*, which is their caſe; and all the Arguments brought for *Haining* do not meet, ſeing they only prove, that a man may uſe what is his own as he pleaſes, *ubi nihil immittit in alienum*; as is clear by the inſtances given, of throwing down his own Wall, or the digging up a Well in his own Land, which differs very much from our caſe, wherein *Haining* doth pour in his poyſenous Water into the River of *Tweed*.

That men are reſtrain'd for the good of the Common-wealth in the uſe of their own property, is very clear from many inſtances in our Law, as men are diſcharg'd by Acts of Parliament to burn Mures, to kill Smolts; the way and manner of fiſhing upon *Lochleven* is preſcribed to the Heretors, by Act of Parliament, and men are forbidden to ſteep lint by publick Acts likewayes. Likeas, the common Law will not ſuffer men ſo to uſe Water running through their own Land, as that they may thereby prejudge Milns belonging to their neighbours, which uſe to go by that Water, and whatever may be alleadged in favours of any innovation in running Waters, yet Lakes being appointed by Nature, ſeem to have from Nature a fix'd beeing; nor ſhould they be opened to the prejudice of others, contrary to their Nature

Theſe objections may, (my Lords) be thus ſatisfied. To the firſt, it is anſwer'd, that the only two reſtrictions put upon men in the free exerciſe of their own, are, *ne in alterius emulationem fiat, vel materiam ſeditionis prebeat*, as is clear by the foreſaid, *l.* 3. *ff. de oper. pub.* neither of which can be ſubſumed in this caſe. And when the Law conſiders what is done *in emulationem alterius*, it acknowledges, *illud non factum eſſe in emulationem alterius, quod factum eſt principaliter ut agenti proſit, & non ut alteri noceat*, l. *fluminum*

§ *ſin.*

§. *ffin. ff. de dam. infect.* and the gloſs formerly cited upon that Law determines, that *Animus nocendi* is not preſum'd, if any other cauſe can be aſſigned: and in this caſe, *Haining* can aſcribe his opening this Lake, to the prejudice it did to his Land, and to his Health, whereas it cannot be alleadg'd, that he ever expreſt any malice againſt the fiſhers upon *Tweed*, many of whom are his own Relations. As to the inſtances given, wherein the Law doth reſtrict the free uſe of Property, the Principle is not deny'd, but it is miſapply'd. For the Law only bounds the Proprietars power in ſome caſes, wherein his loſs may be otherwayes ſupplied; as in Mureburn, and killing of Smolts at ſuch a ſeaſon of the year, and in ſteeping Lint in running Waters, which may be as commodiouſly done in ſtanding Pooles; but theſe Purſuers crave this Lake to be ſtopt at all times, nor is there an apparent Reaſon here as there, this Purſuit being founded only upon a conjectural prejudice, and in theſe caſes, the Prohibition is made neceſſar by the generality, and frequency of Occurrences, and yet though ſo circumſtantiated, there is ſtill a publick Law neceſſar. And when a publick Law diſcharges the free exerciſe of Property, it ordains him in whoſe favours the Prohibition is, to refound his Expences who is prohibited: Nor is the Common-wealth here prejudg'd ſo much by this, as it would be by the contrare, for thereby all Coal-heughs, Lead-mines, and the winning of other Minerals would be diſcharg'd; whereas it is uncertain if this water chaſeth away the Salmond, which are at beſt but a caſuality, and which will go but from *Tweed* to other Rivers in *Scotland*, for they cannot ſtay in the Sea. Salmond-fiſhing is but an accident to Rivers, but there being the common porters is their natural uſe. Thus (my Lords) you ſee that we contend for what is natural to Rivers, they for what is but caſual; we are founded upon the nature and priviledge of Property, they upon meer conjectures.

The Lords enclin'd to ſuſtain Hainings *Defence; but before anſwer, they granted Commiſſion for examining upon the place, what prejudice was done.*

For

For the Viſcount of *Stormont*, againſt the Creditors of the Earl of *Annandail*.

SECOND PLEADING.

Whether a Clauſe prohibiting to ſell, will prejudge Creditors.

THe deceaſt Viſcount of *Stormont*, having by his Majeſties favour, and his own induſtry, acquired the Lordſhip of *Scoon*, he did tailie the ſame to *Mungo* Viſcount of *Stormont*, and the Heirs-male of his body; which failing, to *John* Earl of *Annandail*, and the Heirs-male of his body; which failing, to *Andrew* Lord *Balvaird*, and the Heirs-male of his body; and to prepetuat his own memory, as the reward of his induſtry, he did cauſe inſert this Proviſion in the Charter and Seaſine, *viz.* That it ſhould not be lawfull to the ſaid *Mungo*, to diſpone, or wodſet any of the ſaids Lands ſo tailied, or to do any deed whereby the ſaids Lands might be evicted or appriſed from them, without the conſent of all the perſons contained in that Tailzie, or their Heirs; which if they contraveened, that they ſhould, *ipſo facto*, looſe all Right or Title to the ſaids Lands, and the Right ſhould accreſs to the next Heir.

The late Earl of *Annandail*, having very profuſely and unneceſſarily, ſpent not only his own Eſtate, but likewayes contracted

tracted debts, for which the Lordſhip of *Scoon* is appriſed, this Viſcount of *Stormont*, as immediat Heir of tailzie, craves that it may be declared, that the Right to the ſaid Lordſhip of *Scoon* is devolved upon him by the forſaid contravention, and that he ſhould enjoy the ſaid Eſtate, free from any debts contracted by the Earl of *Annandail*.

Though this purſuit appears clearly to be founded upon the expreſs will of the firſt Diſponer, who as he might not have diſponed, ſo might have qualified his Diſpoſition with any conditions he thought fit; and albeit ſuch clauſes as theſe tend effectually to preſerve illuſtrious families, yet the Creditors of the late Earl of *Annandail* do alledge, that though this his contracting of debt may furniſh action againſt the Earl of *Annandails* Heirs, for any prejudice they can ſuſtain by his contraveening the foreſaid Proviſion, and though by vertue of this *Pactum de non alienando*, all the perſons in the tailzie were bound up from ſelling the ſaids Lands; yet no paction, nor proviſion could annull debts, which were *bona fide* lent by them, to a perſon who ſtood in the Fee. Which Defence they urge by many ſpecious reaſons; as firſt, That there is nothing ſo contrary to the Nature of *Dominium*, and Property, as that he who is Proprietar ſhould not have the free exerciſe of his Right and Property, which free exerciſe conſiſts in the liberty to alienat, and to make uſe of what is his own, for defraying his juſt debt, and anſwering his neceſſar occaſions; and they pretend, that it were moſt abſurd and inconvenient, that a perſon ſhould be raiſed to the title and dignity of a Noble-man, and ſhould be conſeſt by the Law, to have an abſolute right to an Eſtate, and yet that though he were captive in the Turkiſh Gallies, he ſhould not be able to raiſe money for redeeming himſelf from that bondage; and which ſeems yet more repugnant to the inclination, and intereſt of the Diſponer, that if a Fine were impoſed with aſſurance, that if the Fine were not payed, the Eſtate ſhould forfeit, yet the Proprietar behoved

idly to ſtand, and ſee the Eſtate ſink. And though an advantagious occaſion offered of buying his own Superiority, his multers, or any ſuch advantage; yet the Heir of tailzie could not raiſe money for that uſe, nay nor for alimenting himſelf, if the Rents periſh'd by war, or other accidents. This is to have, and not to have an Eſtate, a paralitick Property, and an uſeleſs Right. To allow, that ſuch a Clauſe in a Charter, might annull all the debts contracted by him to whom it is granted, were to deſtroy and ruine Commerce, which is the very ſoul of a Common-wealth, and which by how much it is incumbred by unexpected Clauſes, is by ſo much impared and burdened. Commerce doth oftimes require ſpeedier returns, and diſpatch, then can allow a ſerious conſideration, of all the ſecurities and evidents of thoſe, with whom we deal; neither are theſe alwayes ready to be produced, nor doth the Law in what relates to Commerce, conſider all that a Lender may do for ſecuring himſelf, but what is ordinarily done; and it is moſt certain, that the moſt exact men do not enquire into the ſecurities of thoſe with whom they contract in lending money; and though ſomething may be pleaded in favours of ordinary clauſes, which either Law, Cuſtomes, or Deciſions have allowed, yet it were extraordinarily prejudicial to Commerce, to make a man forfeit his ſum, becauſe he did not guard againſt *pactum de non contrahendo debitum*, a paction as unſuitable to the nature of Propriety, as unuſal in this Kingdom: and though the Legiſlators do in ſome places allow ſuch pactions as theſe, as is clear in *Lege Majoratus* in *Spain*, yet they are made tollerable there, becauſe being introduced by a publick Law, they are univerſally known, and he who contracts with perſons ſo prohibited there, forfeits his ſum, becauſe he neglects a publick Law, and not becauſe he contemns the privat prohibition of a Diſponer. Nor are ſuch pactions as theſe to be ſo ſeverely obſerved, as neceſſar for preſerving Noble Families, and ſo fit for our Kingdom, which ſubſiſts by theſe; for if the nature of

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Propriety were to be alter'd, in ſo high a meaſure, as it is by this pact on, it could in juſtice only be altered by a publick Law, wherein the Eſtates of Parliament (who are with us only Judges of what is convenient for the Nation in general) might declare, that it were fit to turn ſuch a paction as this into a Law: and ſince for ſo many Ages, the Parliament has not thought this fit, nor have privat families ever introduced any ſuch pactions till now, we muſt either judge, that theſe are not fit for privat families, or that thoſe underſtood not their own intereſt.

As to ſtrict Law, whereupon this purſute is only founded, the Creditors do repreſent, that though Lawyers have allow'd *pactum de non alienando*, yet they have extended it no further, then to annull Diſpoſitions made contrary thereto; but they never ſtretch'd it ſo far, as to annull all Debts contracted by the perſon prohibited to diſpone, *l. ea Lege, C. de condict. ob. cauſ. dat.* 2. Though they allow'd theſe prohibitions, *quando inducta erant à Lege, à Judice, aut à Teſtatore per ultimam voluntatem*; yet they did not allow ſo much favour to Prohibitions, which are only founded *ſuper pactis viventium*, as is clear by *Craig. l. primo diages.* 15. *Omnes terræ, (inquit ille) in Feudum dari poſſunt, niſi quæ à Lege, Judice, aut Teſtatore in ultima voluntate dari prohibentur.* 3. Lawyers do not allow, that ſuch Prohibitions as theſe, though reſolutively conceived, ſhould abſolutely annull all alienations made by the perſon prohibited, except the Prohibiter reſerve ſome *Dominium* and Property to himſelf in the thing diſpon'd, by vertue of which reſervation, he has power to quarrel all deeds done, and the perſon to whom he diſpones is becauſe of that reſervation, not ſo abſolutely in the Fee, or Property, as that his Diſpoſition ſhould be unquarrellable; as is clear by *Bartol.* and *Baldus*, both *ad l. Sancimus. Cod. de reb. alien. non alienand.* where they conclude, *quod ſi is cui promiſſum eſt, de non alienando reſervavit ſibi jus aliquod in re, hypothecæ, vel dominij, impe-*

ditur translatio, aliter non, & etiamsi pactum adhibitum sit in ipsa traditione, & cum pacto resolutivo, tamen non impedit dominij translationem, sed illo casu alienans tenetur tantum ad interesse. And therefore, seing the Disponer reserved no right to himself, but that the late Earl of *Annandail* was fully in the Fee, It were against the principles even of strict Law, that debts contracted by him should be annull'd, as contrary to the Prohibition. 4. When a person is prohibited to alienat, that Prohibition is still restricted to voluntar and unnecessar alienations, the design of the Disponer being to curb such of his successors, as should be luxurious, but not to bind them up when frugal, in occasions that are necessary and advantagious; and the Law is content to own such pactions, *in odium* of such as have fed the luxury, or prey'd upon the simplicity of those with whom they contracted, without any design to vex Commerce, or to preclude those successours from being relieved in their honourable and necessar occasions. *Prohibita alienatione, tantum voluntaria prohibita censentur, non vero necessaria, necessitas enim Legem non patitur,* as *Reiters* observes, *tract. de alien. cap. 6. sec. 4.* which may be further clear, *per l. 5. ff. de pet. hæred. & l. 69. §. 1. ff. de legat. 2.* And suitably to this, though in our Law Ward-lands recognise if they be voluntarily dispon'd without the consent of the Superiour, yet he is allowed to sell the less half of his Lands without the Superiours consent, which is allowed by the Law to relieve his necessities; and though he cannot voluntarily alienat the greater half, yet all the Few may be appryses from him by his creditors, for satisfaction of his just debt. And therefore, seing the late Earl of *Annandail* was known to be a judicious person, and to have lived very soberly, and that these debts can be instructed to have been contracted for relieving him out of the necessities unto which he was thrown by the iniquity of the times, and his constant adhereing to his Majesty; It is by these Creditors pretended, that these debts cannot be annull'd, as contrary

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to that prohibition, which they neither did, nor were oblieged to know. And ſince our Law has thought, that Inhibitions and Interdictions ſhould be publiſhed, and regiſtrat for putting the ſubjects in *mala fide*, It can never allow, that ſuch clauſes as theſe which are neither publiſhed, nor regiſtrat, ſhould produce the ſame effect.

To theſe Arguments, they add, that God Almighty has oftimes teſtified his diſpleaſure againſt ſuch Clauſes, whereby, his Providence is inſolently bounded by vain man, who endeavours to build himſelf a Babel againſt Heaven; and by which Clauſes likewiſe, man will endeavour to perpetuat his own memory here, and call his Land to all Ages by his own Name, againſt the expreſs advice which the Scripture gives.

I do confeſs, (my Lords) that thoſe ſpecious pretences, eſpecially when preſt with ſo much zeal, and eloquence, may make impreſſions upon ſuch as are not intimatly acquaint with the principles of Law; but I hope, where we have ſuch Judges as your Lordſhips, there can be little hazard from ſuch objections: but before I endeavour to ſatisfie theſe, I crave leave to lay out before your Lordſhips, thoſe grounds whereupon my Client founds his purſute.

It is an uncontraverted, and firſt principle of Law, that *quilibet eſt Dominus, & arbiter rei ſuæ*, and therefore may diſpoſe upon his own as he thinks fit; nor can any thing leſs then a Law bound the exerciſe of this Power; and every man being Judge of his own conveniency, Lawyers do very properly term the conditions adjected by a diſponer, *leges contractus*, and the Feudaliſts call the conditions under which a Few is diſpon'd, *leges feudi*; *feuda* (ſaith *Zaſius*) *à pactis contra naturam ſuam ſunt tranſmutata, pacto pragravante naturam feudi*: and albeit our Law has defer'd very much to equity, and to the principles of the civil Law; yet privat tranſactions betwixt parties, are not to be limited by thoſe: But pactions are to be obſerved amongſt them in their full extent, as is ordain'd with us by an Act of *Sederunt*, 1573. Law may

may be receded from by privat Pactions; and therefore, much more muſt privat Pactions bind where they are contrary to no expreſs Law: and ſince *pactum in re familiari æquipollet juri publico*, Reg. Maj. lib. 3. cap. 10. & lib. c. cap. 31. It neceſſarily followes, that as a Law or Deciſion might have eſtabliſh'd their pactions, *de non alienando*, & *non contrahendo debitum*, which is acknowledged by the Creditors themſelves, that a condition inſert in a Charter may do the ſame as effectually: and if the pretence of publick Equity and Commerce, might alter the deſtination of a Diſponer, or mutual pactions of privat Perſons, what uncertainty would this occaſion in Humane Affaires? or who could be ſecure, that the Tranſaction he made, ſhould hold? For there are few men who do not differ in their conceptions about Publick Commerce; this were to unhinge all privat Pactions, which perſons had at firſt ſuited to their own neceſſities, and inclinations, and to make Judges who ſhould be ty'd to a fixed rule, unreſtrain'd arbiters, over the affairs and fortunes of the people: for they might, almoſt in all caſes, recede from privat tranſactions, upon pretext that they are contrary to publick good, equity, or commerce. But if any conditions adjected by Diſponers are to be obſerved, ſurely thoſe which are adjected in a free gift and donation are moſt to be obſerved; and it is certainly contrary to reaſon, that he who needs not diſpone his own Land except he pleaſe, may not diſpone it as he pleaſeth.

As the Law hath been very tender of the intereſts of all Proprietars, ſo of all others, it hath been moſt tender of thoſe rights, whereby men have declared how their will ſhould be obey'd, and their memory perpetuated after their death. Law deſigning thereby at once to encourage men to be frugal, becauſe they may know that what they have gain'd by their induſtry, ſhall be diſpoſed of according to their will; and to comfort men againſt death, becauſe they may know that their will ſhall be as exactly execute, as if they themſelves were ſtill alive, *Uti quiſque de re*

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ſua legaſſit, ita jus eſto. The Law in all Contracts, conſiders moſt, what was the deſign of the contracters, and when any thing is diſpon'd for a particular cauſe, when that cauſe fails, the diſpoſition falls as *cauſa data, cauſa non ſequuta, & ſi ea lege donavi, defectus cauſæ impulſivæ reſolutionem contractus inducit, quia ea lege donavi cum alias non eſſem donaturus*, l. *cum te. c. de pact. inter empt.*

That ſuch pactions as theſe are very lawful, and ordinary, is clear both from the civil, and feudal Law. For by the civil Law, though there were tailzies, yet the Romans had their *fideicommiſſa*, which did very much reſemble them, and by which the Perſon *cujus fidei res erat commiſſa*, could neither diſpone nor impignorat; and if he did diſpone or impignorat, that perſon in whoſe favour the *fidei commiſſum* was granted, might not only purſue the diſponer for damnage and intereſt, but might likewiſe annull what was done contrary to the truſt, as is clear, l. *fin. cod. de reb. alien. non alienand. Sancimus, ſive lex alienationem inhibuerit, ſive teſtator, hoc fecerit, ſive pactio contrahentium hoc admiſerit, non ſolum dominii alienationem, vel mancipiorum manumiſſionem eſſe prohibendam, ſed etiam uſus fructus dationem, vel hypothecam, vel pignoris nexum petitus prohiberi; ſimilique modo, & ſervitutes minime imponi, nec emphyteuſeos contractum, niſi in his tantummodo caſibus, in quibus conſtitutionum auctoritas vel teſtatoris voluntas, vel pactionum tenor qui alienationem interdixit, aliquid tale fieri permiſerit.*

Theſe Clauſes, *De non alienando, & non contrahendo debitum*, are moſt allowable by the Feudal Law, where ſuch Tailzies are called *Feuda Gentilitia, & Feuda ex pacti Providentia*; yea, and by the Feudal Law, it was not in the power of him to whom it was firſt diſponed, to alienat or affect the Few, either in prejudice of the Superiour, or of him who was next to ſucceed: and what is more ordinar with us, then ſuch obligations in Contracts of Marriage? Sir *Thomas Hope* is of opinion, that a Right granted to a man and his Heirs, ſecluding Aſ-

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ſignayes, could not be compriſed by a Creditor; and ſure that excluſion is not ſo valid, as a Clauſe irritant and reſolutive, which is *actus maxime explicitus & geminatus.*

From theſe Principles, there do ariſe very natural anſwers to the alledgeances proponed for the Defenders; for whereas it is contended, that ſuch reſtraints as theſe are inconſiſtent with Property, It is anſwered, that there is nothing more ordinar then to qualifie Propriety, as appears clearly by the nature *fidei-commiſſi, pacti gentilitii*, and very many other inſtances; and even in our Law, Ward-lands cannot be diſponed upon without the conſent of the Superiour; and it is more contrary to the nature of Property and *Dominium*, that a man cannot diſpone upon what is abſolutely his own, under what reſtrictions and qualifications he pleaſes, then that he who hath only a qualified *Dominium*, ſhould be in a capacity to diſpone abſolutely, upon what was not abſolutely his own. That Maxim whereupon we found, that *quilibet eſt moderator & arbiter rei ſuæ*, has no exception expreſt in it; whereas the definition of *Dominium* inſiſted upon by them, which is, that it is *Jus de re ſua libere diſponendi*, has an exception adjected to it, which is, *niſi quis Lege prohibeatur*; under which word *Lex*, the Doctors alwayes comprehend *pactum*, and to prevent all miſtake, ſome do expreſly ſay, *niſi quis Lege vel pacto prohibeatur*: So that in vain do they found upon the nature of *Dominium*, ſince the very definition of it doth contradict what is alledged.

To the ſecond difficulty, bearing that theſe Clauſes are deſtructive of Commerce; It is anſwered, that the liberty of diſponing upon our own, as we think fit, doth more nearly concern us, then the liberty of Commerce; eſpecially in this Kingdom, which ſtands more by ancient Families, then by Merchants; and therefore ſeing theſe Clauſes tend neceſſarily to perpetuat Families, and the other doth only tend to the better being of Trade, we ought to preſer the purſute to the defence. And to what purpoſe ſhall we gain an Eſtate by Commerce,

when we cannot ſecure it by ſuch clauſes? Nor are theſe clauſes deſtructive of Commerce, as is alledged, more then Inhibitions or Interdictions, and it is eaſier to read a Charter, then to try the Regiſters; and *England* and *Spain*, which are more intereſted in Commerce then we, have by allowing ſuch Clauſes, evidently declared, that they think them not abſolutely inconſiſtent with Commerce. But the truth is, real Rights are not the foundation of Commerce; for Commerce is maintain'd upon the ſtock of perſonal Truſt, and the main thing which Traffiquers relye upon, is the perſonal Truſt which is amongſt them, and not the conſideration of any real Rights.

I do not conceive my ſelf oblieged to take much notice of the Creditors being in *bona fide* to contract with the Earl of *Annandail*; for if *Annandail* had no power to burden that Eſtate, their *bona fides* could not give it him; nor could a Creditor appriſe from him that to which he had no right, no more then I can compriſe one mans Eſtate, for another mans Debt: and if *Annandail* had only given a Back-bond, declaring that the Eſtate was only in his perſon by way of truſt, the Creditors could not have appriſed it for their Debt, though they might likewayes have alledged that they were in *bona fide* to lend. For, the Law conſiders only *bona fides*, where thoſe who alledged the *bona fides*, did exact diligence, which theſe Creditors cannot alledge; for if theſe Creditors did not at all call for *Annandails* Rights to *Scoon*, they cannot be ſaid to have laid out their money in contemplation of thoſe Rights, but in contemplation of his other Eſtate, or upon the account of a perſonal Truſt; or if they did call for thoſe Rights, they might have very clearly ſeen his Prohibition, and conſequenly would have been ſecured againſt lending upon the faith of this Eſtate.

Whereas it is urged, that ſuch Prohibitions as theſe, are only allowed, when they are introduc'd by Teſtament, by a Law, or by a Judge; but not when they are introduced by

Contracts or Diſpoſitions *inter vivos*, It is anſwer'd, that if it be allowable the one way, it ſhould be the other; for the deſign is rather more deliberat in a Diſpoſition, then in a Latter-will: for the one uſes to be an act of health, and the other of ſickneſs, and the one is as contrary to Commerce as the other is: and if any weight be laid upon the favour allow'd by the Law to *ultima voluntas*, upon the account of conſoling the Teſtator in obeying what he deſigns, this favour is equally communicable to both, for in both there is a Deſignation made of the way and manner of ſucceſſion, in which a dying man is as much concerned, when he makes a Deſignation by a Diſpoſition, as when he makes it by a Teſtament; and therefore, *Les ſubſtitutions contractuelles ont les meſmes Effects en* France, *que les Teſtamentaires, dans la prohibition d'aliener*, as *Lowet* obſerves, *tit. 5. num. 9.* and for which he cites many deciſions; and where he obſerves very judiciouſly, that the reaſon why the Roman Law did not allow theſe Subſtitutions, and Prohibitions in Contracts, as it did in Teſtaments, was, becauſe Teſtaments was the only way amongſt them of diſponing upon Eſtates, and of making Subſtitutions, and *fidei-commiſſa*; to make which was not allow'd by Contracts, *quia auferebant teſtandi liberam facultatem*, which ſubtilty is not now allow'd in this Age: for on the contrary, Tailzies and Contracts of Marriage, are now the ordinary wayes of diſponing Eſtates, and if men might alter ſuch deſtinations of Contracts, ſuch as do contract with them would be in a hard condition.

Nor is there more weight in that part of the alledgeance, which bears, that thoſe Prohibitions do only annull deeds done in favours of him who has reſerved ſome Right in his own perſon; for Tailzies with ſuch Prohibitions, do imply a reſervation in favours of thoſe who are to ſucceed, and the Tailzie is in that caſe but a Right of Truſt to the behoof of the Family; and the Proviſion in their favours is equi-

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pollent to a reſervation. The deſign of both is the ſame, and therefore they ſhould both operat the ſame effect.

Diſcourage not, (my Lords) ſuch as love to be frugal, becauſe they hope their Eſtate may remain with their Poſterity; encourage not ſuch as reſolve to ſhake looſe, by their Prodigality, what was eſtabliſh'd by their wiſe Predeceſſours: By favouring the Creditors Defences, you will but gratifie the prodigality of Heirs, or the lazineſs of Creditors; whereas, by ſuſtaining my Clients purſute, you will ſecure us as to our own pactions, and as to your deciſions; you will perpetuat Noble Families, and bound the Luxury of ſuch as are to ſucceed.

The Lords ſuſtain'd the Purſute, and repell'd the Defences propon'd for the Creditors.

For the Lady *Carnagie* and her Lord, againſt the Lord *Cranburn*.

THIRD PLEADING.

Whether Tax'd-wards be lyable to Recognition.

My Lord Chancellor,

THe late Earl of *Dirletoun* having no Children, beſides two Daughters, and having an Eſtate conſiſting of Lands in *Scotland* and *England*, did very judiciouſly at firſt reſolve to marry one of them in *Scotland*, and the other in *England*; and in purſuance of this deſign, he beſtowed *Elizabeth* the eldeſt, upon *William* Earl of *Lanerick*, Secretary of *Scotland*, Brother to Duke *Hamiltoun*, but which was more, a perſon admir'd for his heroick Vertues; and whoſe Alliance was courted at any rate, by the moſt eminent Families of both Kingdoms. The younger of theſe Daughters, named *Diana*, was match'd thereafter to the Lord *Cranburn*; and as the Earl of *Lanerick* could not but have juſtly expected all, or at leaſt the far greateſt ſhare of that Eſtate, So the Lord *Cranburn* could ſcarce have expected thereafter any thing above an ordinar Portion: Yet, ſuch is the capriciouſneſs of old men, that the Earl of *Dirletoun* did, in *anno*, 1649. by the impreſſions of ſome who were inveterat enemies to the Family of *Hamiltoun*, diſpone the Lands of *Innerweek*, *Fenton*, &c. failing Heirs-male of

of his own body, to *James Cecil* his Grand-child, and the Heirs-male of his body.

His Majesty finding, that the said Estate was most illegally dispon'd to *James Cecil*, without His consent as Superiour, they holding Ward of Him, and that he had thereby defrauded the just expectations of so worthy a person as the Earl of *Lanerick*, and so the Lands recogniz'd by the said Disposition, did gift the saids Lands to the Lord *Bargeny*, for the behoof of the Earl of *Lanerick*; upon which Gift of Recognition, there is now a Declarator pursued by the Lady *Carnagie*, eldest Daughter to the said Earl of *Lanerick*, who thereafter became Duke of *Hamiltoun*, wherein she craves, that it may be declar'd by you, that she has the only Right to these Lands.

There are very many Defences propon'd for the Lord *Cranburn*, which I shall endeavour thus to satisfie.

The first is, Recognition has only place *in feudo recto & proprio*, whereas these Lands hold Tax'd-ward, in which manner of holding, all the casualities are taxed to a very inconsiderable sum, which sum is designed to be the only advantage that shall accress to the Superiour: and the reason why Ward-lands recognize when they are sold without the Superiours consent, is, because the Superiour having so great interest in the Lands which hold by simple Ward, as to have the Ward and Marriage of the Vassal, the Law did therefore obliege him not to alienat that Land, without the Superiours consent; which reason ceaseth, where the Ward is tax'd, the Superiours interest becoming very inconsiderable by the Tax: nor can it be imagin'd, but that the Superiour, having dispensed with the great casualities of Ward and Marriage, has consequently dispensed with the said restraint, *Cui datur majus, datur minus, præsertim ubi minus inharet majori & est ejus accessorium.*

For satisfying which difficulties, your Lordships will be pleas'd to consider, that our Law appoints all Ward-lands to recognize, if sold without the Superiours consent, and makes

no

no distinction betwixt simple and tax'd-ward; the general is founded upon expreſs Law, and there is no expreſs warrand for excepting tax'd-ward. 2. Seing theſe Lands could not have been ſold before they were tax'd, by what warrand can they be ſold ſince they were tax'd? Seing though the caſualities of Ward and Marriage were tax'd, and thereby theſe caſualities expreſly remitted, except in ſo far as they are tax'd; yet there is no power granted to ſell, without the Superiours conſent: Nor is that priviledge remitted by the Superiour, *Et feudum alteratum in una qualitate, non intelligitur alteratum in aliis & actus agentium non operantur ultra conceſſa.* 3. The power of ſelling without the conſent of the Superiour, is different from the caſualities of Ward and Marriage, which are here only tax'd; for Few-holdings are oft-times burdened with this reſtraint, and this reſtraint was of old taken off expreſly by warrands under the Quarter-ſeal, without taxing the other caſualities; So that this priviledge differs from theſe, and the one cannot be comprehended under the other.

The ſecond Defence is, that by the Feudal Law, Recognition *ob alienationem feudi eſt crimen, & delictum feudale*, againſt which error, *etiam probabilis ignorantia excuſat*; as is clear, *lib. 2. tit. 31.* The words are, *Quod enim dicitur alinatione feudum aperiri domino, intelligendum eſt cum à ſcientibus alienatum eſt beneficium*, which are the words of the ſaid Law: wherenpon, *Socinus*, reg. 153. though he do give it as a rule, that *Emphyteuta rem emphyteuticam vendens a jure ſuo regulariter cadit*, conform to the civil Law, *l. ffinal. C. de jure emphyteutico*, he ſubjoyns theſe words, *Fallit ubi emphyteuta venderet ignorans rem eſſe emphyteuticam*; and accordingly, *Craig. de recognitione, lib. 3. diages. 3.* and in the caſe of diſclamation, *lib. 3. diages. 5.* layes down for an undoubted principle, *that ignorantia craſſa excuſat feudalia delicta.* And here, the ſubject of the queſtion is not *in jure, & in theſi*, whether Ward-lands ſhould recognoſce; but *in facto, & hypotheſi*, his

Right

Right being of the nature, and in the terms foreſaid, he might diſpone without hazard, as to which, an error in him, who was an illiterat man was very excuſable, eſpecially having conſulted *Peritiores*, and having been aſſur'd by very eminent Lawyers, that there was no hazard in diſponing thoſe Lands, without the Superiours conſent, they holding Tax'd-ward, which was ſufficient to have defended him *in feudo amittendo*.

To which it is anſwered, that ignorance of the Law excuſes no man; and the caſe having been at beſt dubious, the Vaſſal ſhould not have hazarded upon what the Law might conſtruct to be a diſowning of his Superiour; and ſince every man is oblieged to know the nature of his own Few, the Law doth preſume, that every man doth know it, *Nam quod inesse debet, inesse preſumitur*; and therefore, *Craig* doth very well conclude, pag. 344. *tit. de recognitione*, that *Ignorantiam, pretendens vix audiendus eſt, cum ſit craſſa ignorantia, feudi ſui conditionem ignorare*: and though he obſerves there, that *excuſabitur, qui feudum ſuum non militare credidit, cum militare eſt*; yet, that cannot be extended to this caſe, wherein the Vaſſal certainly knew that his Few held Ward: and though the Law ſometimes doth excuſe a Vaſſal, who had reaſon to doubt the condition of his own Few, becauſe of ſome myſterious Clauſe, or becauſe he was a ſingular Succeſſor, and had not recovered the Writes of the Few as to which he tranſgreſſed, or was neceſſitate to do the deed, for which he was challenged, by poverty, or ſuch other occaſions; yet, that in the general, ignorance did not excuſe *delicta feudalia*, is very clear by the opinion of the learnedeſt Feudaliſts, *Laur. Silv. de feud. recog. queſt. 60. præpoſ. in cap. 1. §. præterea de prohib. feud. alienat.* And in our Law, it was never found, that ignorance did defend againſt recognition, the falling of an eſcheit, diſclamation, *&c.* And if the Superiour were oblieg'd to prove the Vaſſals knowledge, it were impoſſible ever he could prevail in any purſute; knowledge being a latent act of the mind, which can never be proven

but

but by oath; and to refer knowledge to the oath of the Vassal, were not only to frustrate the Superiour, but to tempt the Vassal to commit perjury; and albeit the Feudal Law did allow the Vassal to purge his guilt, by deponing in some cases upon his design, yet that was only allow'd in cases where the external act was of its own nature indifferent, such as the speaking of contumelious words, that were to receive their genuine interpretation from the design of the speaker; and that did never take place in clear acts, such as this is, wherein the Vassal hath sold his Few without the consent of the Superiour.

The thrid Defence was, that where there is no contempt, there can be no recognition; But so it is, that as the presumption of contempt is taken off by the constant tenor of the Earl of *Dirletouns* respect for his Master, the King; So the Disposition is given to be holden of the King, and that implyes as much, as if it had been expresly provided, that the alienation should be null, if the Superiour should not consent and confirm the same; and such an express Provision should have certainly, in the opinion of all Feudalists, defended against recognitions.

To this it is answered, first, That the clause, *si Dominus meus consenserit*, doth not defend against recognition, though expreſt, *verbis geminatis*, *& pregnantibus*; and unless it be resolutively conceived, bearing that it shall not be valid *alias, nec alio modo*, and although all these cautions be adhibit, yet many Feudalists are clear, that this will not defend against Recognition, where the person to whom the Few is disponed attains to possession, as *Cranburn* here did; for they think, that in that case it is but *protestatio contraria facto, & plus valet, quod agitur quam quod simulate concipitur*: and if this were sustain'd to defend against recognition, no Few should ever recognize, for the Vassal should still defraud his Superiour of any advantage, by inserting a clause *si dominus consenserit*; upon which consideration

ſiderations, your Lordſhips predeceſſours have, by a deciſion the 16. of *February*, 1631. found, that Lands may recogniſe notwithſtanding of this condition. 2. The diſponing of Lands to be holden of the Superiour, is not equivalent to the clauſe, *ſi Dominus conſenſerit*; for the diſponing Lands to be holden of the Superiour, *provenit non ex facto vaſſali, ſed ex natura feudi, & ex ſtilo*; all Fews being given in *Scotland*, to be holden either of the Superiour or the Diſponer, *à me, vel de me*, as ſhall beſt pleaſe the receiver; So that the diſponing the Lands to be holden of the Superiour, doth not ſhew any clear deſign the Vaſſal had to require the Superiours conſent, and conſequently cannot defend againſt Recognition.

To fortifie this point, it is urged by the Defender, that where there is no prejudice to the Superiour, there can be no recognition; and there is no prejudice to the Superiour in this caſe, ſeing the Superiours prejudice is either upon the account, that the Vaſſal *redditur pauperior*, or that the diſponing without the Superiours conſent obtrudes upon the Superiour a ſtranger *ex alienâ familiâ & inimicâ*; whereas in this caſe, the Diſponer was not *pauperior*, having reſerved his own liferent, and in effect, the Fee it ſelf, and power to burden the ſame, and contract debt, and alter the tailzie, and diſpoſe of the Eſtate notwithſtanding of the ſame; and the Lord *Cranburn* cannot be ſaid to be a ſtranger, being deſcended of the Earl himſelf, and being his Grand-child.

To this it is anſwered, that in Law, all ſuch perſons as are not *alioqui ſucceſſuri, ſunt extranei ex tenore inveſtituræ*, and by two expreſs deciſions related by *P. Spotſwood* and *Hope*, it was found, that Diſpoſitions made to the Brother or Grand-child did inter Recognition, though they were likeways *ex familiâ*, *Nec licet* (ſaith *Craig*, pag. 345.) *Vaſſallo unum ex liberis ſuis eligere, ſed vel naturæ, vel juris ordo ſequendus, vel domini electioni res eſt permittenda.*

The fourth alledgeance was, that only *perfecta translatio domini*, can infer Recognition; whereas the Sasine here is null, because it is given to be holden of the Superiour, and Sasines of that nature are intrinsically null, *quo ad omnes effectus*, except the Superiour confirm the same.

To this it is answered, that *si vassalus fecit omne quod in se erat*, to alienat the Few without the consent of the Superiour, that alienation will infer Recognition, though the alienation was null otherwayes, as is clear by *Craig*, pag. 344. *Quod si traditionem Vassalus fecerit, ea tamen sit invalida & nulla exempli causa si chartam dederit, de fundi alienatione tenenda de domino Superiore, quam Sasina sequatur. Et dominus Superior neque confirmaverit, neque ratam habuerit, videtur hanc alienationem nihil periculi secum trahere, cum conditionalis videatur & sub hac conditione contracta, si dominus ratam habuerit, at confirmaverit, quæ conditio, cum non evenit & alienatio nulla sit ex defectu consensus Superioris, & paria sunt in jure omnia non fieri, & non jure fieri; sed profecto in hoc casu puto etiam feudum domino aperiri, nam quandocunque vassalus id omne fecit & exequutus est, quod in se erat, licet factum illud de jure non teneat, tamen quatenus in se est, domini mutationem velle testificatus est fidemque fregit: in hoc etiam casu a feudo cadet, licet alienatio nulla sit.* Suitable to which, *Baldus* hath very well observed, that *licet alienatio sit nulla, ob vitium litigiosi feudum tamen sit caducum, quia in prohibitis non requiritur juris effectus, quod enim prohibitum est effectum sortiri nequit*; and if only effectual alienations could infer recognition, it could never be inferred; for all alienations, to which the Superiour doth not consent, are null, and by the Act of Parliament, 1633. all Seasines of Ward-lands granted to be holden Few, are declar'd null, and yet are declar'd to be the ground of recognition. And whereas it is alledged, that *Craig, pag.* 344. relates the case betwixt *Mackenzie* and *Bain*, In which it was found, that Lands did not recognise, because

not

not regiſtrat within fourty dayes. It is anſwered, That there the Vaſſal *non fecit omne quod in ſe erat*, not having regiſtrat the Saſine timeouſly, and ſo the tradition was compleat; nor did the perſon to whom it was diſponed poſſeſſe in the caſe cited, the Land diſponed, as *Cranburn* did in this: and by the opinion of *Roſenthal*, *capite. 9. concluſ. 4. Feudum (inquit ille) abſque domini conſenſu aperitur etiamſi alienatio ex alia aliqua cauſa forte omiſſa ſolennitatè legis aut ſtatuti, aut ſimili, eſſet nulla modo poſſeſſio vera & actu tradita ſit nam doctores in hac materia conſiderant prejudicium ipſius domini magis in traditione rei quam in alienatione. Vide* Curtium, *Jun. de feudis, pag. 4. num. 85.*

Whereas it is alledged, that the Saſine is null, as given upon a general Letter of Attorney out of the Chancellary, nor are general Mandats ſufficient in *prejudicialibus*, and that this Saſine was given to a Minor, who was extreamly læs'd. To both theſe, the former anſwers are oppon'd, wherein I have endeavoured to prove, that the alienation may be null, and yet may infer recognition; our Law conſiders not Minority, as to caſualities competent to the Superiour, as is clear in the caſes of Non-entry and Rebellion: and ſince the Act of the Diſponer, is that which only infers recognition, it imports not what the condition of the Perſon was to whom it was granted.

It is alſo pretended, that the Saſine is null, as being *actus legittimus qui non recipit diem, nec conditionem*, l. 77. ff. *de reg. juris*; for ſince *executione actus ſtatim perficitur*, its inconſiſtent that *actus* ſhould be *perfectus*, *& exequutus*, and yet ſhould be ſuſpended upon a condition, as this Saſine is, which bears, *failing Heirs-male of the Earl of* Dirletouns *body*.

To this its anſwered, that this Saſine cannot be call'd *actus legittimus*, that being ordinarily a term appropriat to judicial Acts, whereas there is nothing more ordinar then that Saſines ſhould be conditional, as we ſee in Saſines, given upon warrandiſe Lands, and in Saſines following upon Wodſets; nor is it denied

that Saſines may bear reſolutive conditions, and if ſo, why not other conditions, theſe being of all others moſt ſevere? Nor have any Lawyers written upon this ſubject, who have not divided Saſines *in puram & conditionatam.*

The fifth alledgeance was, that there can be no recognition where the Vaſſal had power to diſpone, and the Earl of *Dirletoun* had by his Charter, power to diſpone; for theſe Lands are diſponed in his Charter *hæredibus & aſſignatis*, which implies *poteſtatem alienandi*, which the Defenders learn'd Advocats do found upon *tit.* 48. *lib.* 2. *feud Si quis enim ea lege alicui feudum dederit ut ipſe, & ſui hæredes, & quibus dederint habeant qui ſic accepit poterit vendere, vel alienare ſine conſenſu Domini*; for which likewayes they cite *Craig, dicta. diag.* 3. *Clarus*, *Hottoman* and other Feudaliſts.

To this it is anſwered, that this general clauſe *hæredibus & aſſignatis*, is only meer ſtile, and the word *aſſignatis* is uſed here improperly, as it is uſed in Bonds, in which a man binds himſelf, his Heirs and Aſſignayes, whereas it is impoſſible for a man to bind his Aſſignayes. *Argumentum a ſtilo* is not ſtill probative, eſpecially in this Age, wherein ſtiles are become too laxe, and in our eldeſt ſtiles, there is a luxuriancy, which deſerves rather to be corrected, then allowed; thus Inhibitions forbid us to alienat Moveables, and ſingle Eſcheits give right to Reverſions, albeit our Law reprobats our ſtile in both theſe; and this clauſe was not deſigned to import a liberty to alienat, for els there could be no recognition in *Scotland*, ſeing all Charters bear that clauſe, and ſuch as have that clauſe have oftimes been found to recogniſe, *& generales clauſulæ non extenduntur ad illicitum:* and that by the Feudal Law, the word *Aſſignatis* is not equivalent *to quibus dederit*, is clear; ſeing the Feudaliſts uſe no ſuch term as *aſſignati*; and in our Law *hæredibus legittimis*, *& aſſignatis*, muſt not be interpreted as if it were equivalent to *quibus dederit*, but to that clauſe uſed by Doctors, *quibus legittime dederit*; and all Feudaliſts are poſitive,

fitive, that the clauſe *quibus legittime dederit*, implies neceſſarily that the Superiours conſent is ſtill neceſſar.

Likeas, *Generalis clauſula non extenditur ad prohibita ubi fieri poteſt congrua interpretatio*; But ſo it is, that the word *aſſignati* may be underſtood of Compriſers, or of ſuch to whom the Vaſſal ſhould diſpone the leſſer half of the Few: So that when a Few is granted *haredibus, & aſsignatis*, it is lawfull for Creditors to compriſe that Few, or for the Vaſſal to diſpone any part thereof, not extending to the half; but that Clauſe can never import, that it ſhould be lawfull for him to diſpone the whole, without the Superiours conſent, that being an interpretation which the parties themſelves never deſigned; and priviledges which are inherent in the nature of a Few, (as this is) are never underſtood to be diſcharged, except where they are diſcharged expreſly.

The Defender, my Lords, hath told you, that he propones all theſe Defences jointly, which may diſcover to you, how frail his own Advocats judge theſe Defences to be: Arguments which are weak, being join'd, may by their mutual aſſiſtance plead pitty, but they can never aſtruct the proponers Right, no more then many cyphers can make a number, nor many uncertainties a certainty: This is a ſhift which Eloquence, not Law, has invented, and may prevail with Arbiters, but ſhould ſeldom convince Judges.

The Lords found, that theſe Lands, though holding only Taxt-ward, did recognize; and repell'd alſo all the other Defences.

For

For *Alexander Carmichael*, againſt the Town of *Aberbrothock*.

FOURTH PLEADING.

How far the Borrower in commodato eſtimato, *is lyable, if the thing be loſt*, vi majore.

WHen the Town of *Dundee* was ſo fortified, that its inhabitants had reaſon to expect ſecurity to the Ships which lay under their walls, either by way of defence, or capitulation; the Town of *Arbroth* did crave the lend of ſome Cannons from *Alexander Carmichael*: but becauſe the ſaid *Alexander*, as a Burgeſs in *Dundee*, might have expected from the foreſaid Garriſon, or from his being able to ſail his armed Ship where he pleas'd, perfect ſecurity to his Guns, he therefore refuſed to lend the ſame, till *Patrick Wallace* and other privat Burgeſſes of *Arbroth* ſhould eſtimat the Guns, and oblidge themſelves to re-deliver the ſaids Guns free from all skaith, harm, or danger, or els to pay the ſum of 500. *l.* as the price agreed upon: and that in reſpect he foreſaw, that the Guns were not only lyable to great danger, *ex ſua natura*, but likewayes becauſe *Arbroth* was a naked Town, wanting walls, men, and skill; and albeit the Town of *Arbroth* did owe to the ſaids Guns the reſiſtance they made to *Cromwels* Ships

in

in three ſeveral attaques, wherein if they had wanted Guns, there Town had been burnt, yet ſo unjuſt are the ſaids *Patrick Wallace*, and others, that when the foreſaid liquid ſum is charg'd for, they ſuſpend upon this reaſon, *viz.* that this Contract is *commodatum*, *& commodatarius non præſtat caſus fortuitos*: But ſo it is, they ſubſume, that theſe Guns were loſt *caſu fortuito*, in ſo far as the Defenders endeavour'd to carry them to *Dundee*; but being beat in by *Cromwels* Ships, they were forc'd to bury them in ſands, out of which they were raiſed and taken by thoſe enemies.

To which it was anſwered, that though *in commodato ſimplici*, *commodatarius non præſtat caſus fortuitos*, yet *in commodato eſtimato*, it is otherwayes, which is moſt clear from *l.* 5. §. 3. *ff. commodato*, the words whereof are, *Et ſi forte res æſtimata data ſit, omne periculum præſtandum ab eo, qui æſtimationem ſe præſtaturum receperit*; which holds not only in *commodato*, but in all other Contracts, where any thing is eſtimat, as is clear in the general, by *l.* 1. §. 1. *ff. de eſtimatoria*, *Eſtimatio autem periculum facit ejus qui ſuſcepit, aut igitur rem ipſam incorruptam debet reddere, aut eſtimationem de qua convenit*: Many inſtances of which general may be given in ſeveral Contracts, but it ſhall ſatisfie me to name *Dos eſtimata*, wherein it is very clear, that the valuing of things delivered, did obliege the receiver to re-deliver either the thing valu'd or its price, though the thing valued did periſh *caſu fortuito*, as is clear, *l.* 10. *ff. de jur. dot.* *Plerumque* (*inquit* Ulpianus) *intereſt viri res non eſſe eſtimatas, ideo ne periculum earum ad eum pertineat maxime ſi animalia in dotem acceperit, vel veſtem qua mulier utitur, eveniet enim ſi eſtimata ſint & mulier attrivit ut nihilominus maritus earum eſtimationem præſtet*: which is alſo moſt clear, *l.* 10. §. 6. *ff. de jur. dot.* And if at any time the Law relax any thing of this alledged ſeverity, in favours of him who receives the thing valued, It is upon the account that the thing valued was delivered for the uſe and advantage, not of him who received

ceived it, but of him by whom it was entrusted; as if in our case, my Clients had entreated the Citizens of *Arbroth* to receive their Guns, and had valued them at the delivery; the Law in that case, would not have burdened the receivers with the loss, where they gave no occasion to the lend; but in the case where the thing valued was lent at the desire of the Citizens of *Arbroth*, and for their advantage, without any possible advantage for the lenders, in that case, which is our present case, the Law doth in expres words tye the receivers to re-deliver either the thing lent, or the estimation, *l.* 17. §. 1. *ff. de estimatoria*; *Si Margarita tibi estimata dedero ut eadem mihi adferes, aut pretium eorum, deinde haec perierint ante venditionem, cujus periculum sit? Et ait* Labeo *quod &* Pomponius *scripsit, si quidem ego te venditorem rogavi meum esse periculum, si tu me tuum, si neuter nostrum sed duntaxat consensimus teneri te hactenus ut dolum & culpam mihi praestes.* Nor can this be well doubted, if we consider the nature of estimation or valuing, and the design of these who enter into such contracts, by their estimating the thing lent.

All Lawyers and others are of the opinion, that *commodatum* becomes by estimation, *anomolum & irregulare*, and the estimation were to no purpose if it did not bind the receiver of the lend to more then what would follow, *ex natura commodati simplicis*; and therefore, seing *commodatarius* was here liable *ex culpa levissima* from the nature of the contract, because the Lend was given only for the advantage of the Lender: It must necessarily be infer'd, that the Receiver of an Lend that is valued and esteemed must be furder liable, els there would be no difference betwixt a thing lent simply, and lent after it is valu'd, and consequently, the valuing before lending shou'd operat nothing; so that seing in an ordinar Lend, the Receiver would be liable in *culpam levissimam*, the Receiver must be liable in *casus fortuitos*, where the thing lent is estimat before lend ng, there being no case *ultra culpam levissimam praeter casus fortuitos.* 2. The

lender

lender did ſecure himſelf by a Bond and the foreſaid Obligation, to reſtore the price, if the thing lent were not free of skaith, hurt or damnage. 3. If there was any thing ambiguous in this caſe, yet the clauſe behoved to be extended, *ad caſus fortuitus*, and that muſt be thought to be the meaning of the parties from the following rules, whereby ambiguous Contracts are to be interpret, *viz.* Firſt, a write is alwaies to be interpret againſt the Subſcriber, who ſhould impute to himſelf, that he did not clear what he intended, and it were unreaſonable that his obſcurity ſhould be a ſnare to another perſon, *ſcriptura ſemper eſt interpretanda contra proferentem.* 2. That in reaſon ſhould be conſtitute to be the meaning of the write, which if it had been treated of, had certainly been condeſcended to by all parties: But ſo it is, that if at the time of the lending of the ſaids Guns, the Lender had refuſed to lend them upon any other terms, then that he ſhould have been ſecur'd againſt all events; It is not to be imagined, that the Borrowers would have hazarded their Lives and Fortunes, and the honour both of their Country and Town, for the hazard of 500 pound; and it is as improbable, that the Lenders would have given the Guns, they being ſtated under all the Circumſtances above narrated. 3. It may appear both from the circumſtance of time, and the nature of the thing lent, that they foreſaw the risk theſe lent Guns were like to run; for none but Idiots would not have foreſeen the ſame: and it were againſt reaſon to think, that a man would ſecure himſelf againſt an open and ſeen hazard, eſpecially being to lend them to perſons who behov'd to buy others, if they had not got the lend of thoſe, and who would have bought theſe Guns, if the lender would have ſold them, and if they had been ſold, the buyers had run all risks.

To this it was replyed, that firſt *commodatum eſtimatum* was only ſo called, when the lender did eſtimate the thing lent, and did take the *commodatarius* only oblieged to reſtore not the thing lent ſimply, but either the thing or value, at the option of the receiver, as was clear, becauſe the receiver might have op-

pon'd compensation against the lender, when he was pursuing for the thing lent, or might make use of the thing lent as he pleased, which was not our case; because the receivers of the Guns could not have retained the same, or have rejected compensation against the Lender, though the lend had been damnified; but it was in the option of the Lender to have call'd either for the Guns, or the estimation, and this estimation and value was agreed upon, to the end that the value might be repeated, if the Guns were lost through negligence, or deterioration, but not if they were lost *vi majore*, or *casu fortuito*. 2. By the expresse words of the Bond, the value is only to be restored in case the Guns be damnified, but there is no provision made against their being lost, nor can that be presumed to be the meaning of the Parties, because *ille presumitur sensus verborum qui est rei gerendæ aptior*, and *casus fortuitus* is very contrary to the nature of *commodatum*. 3. This is not only *casus fortuitus*, but *insolitus*, to which no contract is ever extended, and this case of the Cannons being taken out of the Sands, could never have been foreseen, seing it is absolutely extrinsick, both to the use of Cannons, and to the ordinar hazards of Cannons; and it was unusual and ominous for a Scots man to provide against their being over-run by the Usurpers. 4. These Guns had been lost, if the lender had retained them, seing the Usurpers, after the taking in of *Dundee*, made prize of all their Ships and Guns.

To which it was duplied, that the former Law was oppon'd, bearing that the receiver *commodati estimati* in general *suscipit omne periculum*, and that is properly *commodatum estimatum ubi intervenit taxatio pretii:* and though there may be such a *commodatum estimatum* as is mentioned in the reply, yet, that *omne commodatum estimatum* is of that nature is denied, and seing the answer is founded upon an expres and general Law, it cannot be taken away but by a Law as expres, clearing, that there is no *commodatm estimatum* but in the case instanced in the reply. Likeas the Interpreters, and particularly *Faber*, *ad h.l.* give instances of

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commodatum eſtimatum, in the caſe where the thing eſtimat is to be reſtored, and *eſtmatio* in general produces that effect of tranſferring the hazard as will appear, *per l. 1. §. 1. ff. de eſtimatoria*; by which it is likewayes clear, that if the thing it ſelf be not given back, the eſtimation muſt be delivered, and that the eſtimation extends not only *ad deteriorationem, ſed etiam ad interitum*. Likeas in the general, *eſtimatio* is called a kind of vendition, as is clear by *Calvin*, in his Lexicon upon that word, and the citations there adduced; and in venditions, the receiver undergoeth all hazard, and therefore he ſhould run the ſame hazard in *commodato eſtimato*. As to the ſecond, It is anſwer'd, that he who is oblieged to deliver any thing free from all hurt and damnage, is much more oblieged to deliver back the thing it ſelf, for it is probable, that he who guarded againſt the leſſe danger, would guard againſt the greater.

Whereas it is alledged, that this muſt be the meaning of the parties, the former rules are oppon'd, and it is added, that this caſe could never be called *caſus inſolitus*, nor *fortuitus*, in reſpect that is *caſus fortuitus* which the skillfuleſt or wiſeſt man could not foreſee; but ſo it is, every wiſe or prudent man might have, and could not but foreſee this; and the *brokard rei gerendæ aptior* is only extended to regular Contracts, but not to irregular Contracts as this is, wherein it is confeſt, by both parties, that they intended to tranſgreſs the ordinar rules and nature of *commodatum eſtimatum*, and to wreſt the nature of this Contract to their particurlar caſe; and certainly, *ſenſus aptior rei gerendæ* at that time was, that the lender, who might have ſecured his own Guns, and who was not oblieged to lend them, did deſign to ſecure himſelf againſt all hazards, when he cauſed eſtimat his Guns; elſe, why ſhould he have cauſed eſtimat them? And to the third, where it is alledged, that the raiſing of Guns out of ſand is not the hazard which Guns ordinarily run; It is anſwered, that the burying and ſinking of Cannons is very ordinar; but it being foreſeen in

general, that these Guns might perish by the Usurpers, and in that quarrel, that was sufficient, though every particular circumstance was not foreseen: for if the Guns had been stollen away by night, or had been taken in the return, certainly the receiver would have been lyable; and yet that is not a more ordinar way of losing Guns, then this now instanced.

To the fourth, bearing, that those Cannons had been lost however; It is answered, that the charger is not oblieged to debate what hazard they would have run, he having secured himself by a Bond, as said is, and that might be aswell alledged in venditions, and yet none ever alledged, that the buyer did not run all hazards of the thing bought, and was not oblieged to pay the price, because the seller would have lost the thing sold, if it had remained with him: but the truth is, the Skipper, nor no Burgess of *Dundee* wants any of those Guns which were aboard in their Ships at that time; and it is probable, that though the Ship and Goods had been taken from this pursuer, he had none to blame but these Defenders, who by borrowing his Goods, disabled him to venture to Sea with his Ship: nor can it be imagin'd, that the burying of Goods in presence of the whole Town, and leaving their Carriages open to the Usurpers, was exact diligence; nor did ever the receivers, after the Guns were taken away, either inform the chargers that they might do diligence, or make application to the Usurpers for restitution, as *Dundee*, *St. Johnstoun*, *Crail*, and other Towns did; and wherein they prevail'd so, that these Defenders are not only lyable *ad casus fortuitus ex natura commodati estimati*, but for not doing exact diligence, *ex natura commodati proprii*.

The Lords found, that the Borrowers were not lyable to pay the price, since the Cannons were lost casu fortuito, & vi majore.

For

For Sir *Thomas Stewart* of *Gairntully*, against Sir *William Stewart* of *Innernytie*.

FIFTH PLEADING.

How Fury and lucid Intervals may be proven.

THe deceast Sir *William Stewart*, finding his Daughter *Jean* fit enough to marry, did provide her to a Portion of twenty thousand Merks; in which, though he substitute Sir *William* her Brother and others, yet your Lordships did, by a solemn decision find, that she remained still in the Fee, and might have disponed, notwithstanding of the quality of the substitution, and therefore you did sustain a Right and Assignation made by her in favours of Sir *Thomas* her Brother.

Sir *William* resolving rather to hazard the honour of his Family and Sister, then the loss of the Sum; did at last alledge, that the Assignation was not valid, seing his said Sister was furious, both before and after the granting of that Right: whereas Sir *Thomas*, in maintenance both of his Sisters honour, and of the Right made by her to him, did contend, that she had dilucid Intervals, and at the time when the Disposition was granted, she was *sanæ mentis*; for proving of which, mutual probation was allowed to both Parties, and the Testimonies having been published, It is now alledged for Sir *William*, that albeit your Lordships had found that his Sister was in Fee, when the case

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was at first debated, without relation to the condition in which she was when she made the said Right; yet, though the Substitution was found by your Lordships not to be a sufficient ground to take from her the power of disponing, it behoved at least to qualifie the said power, as that she should not be allowed to dispone upon that sum expressly against the Fathers destination, except she were proven to be a person of an entirely sound judgement; and it behoved to be thought, that the Father perceiving the frailty of her wit and spirit, did only design she should have an aliment during her life, but that after her decease, the sum provided should descend to the person substitute by himself. 2. Furiosity is a disease which so disorders the judgement, that those who labour under it are in Law accounted unfit to make any Right, or to adhibit any consent; and fury being once proven, is still presumed to continue: So that it being proven that this Gentlewoman was once furious, in so far as she tore her Cloaths, and did beat them who attended her, it must be presumed that this fury did continue, except this were taken off by a most pregnant probation, wherein she could be proven, not only to have done acts of folly during the time that she was about the compleating of that Right, but that she had for a long time, both before and after, enjoyed not only *adumbratam quietem*, but an entire soundness of judgement, neither tainted with, nor clouded by that fury, which did formerly incapacitat her to make the Right that is now quarreled. For all Lawyers, and particularly *Zacchæus*, do distinguish betwixt a madness, which hath only *remissionem, sed non intermissionem*, where simplicity continues when the fury ceases, and that fury which doth sometime totally recede: In the first of which they require, that the persons *quorum furor est intervallatus*, do not only *actus sapienti convenientes, sed etiam actus sapientis*, and that they shew not only a present madness, but that they testifie by a long tract of continued recipiscence, a sagacity, which proves that they are fully returned to the vigour of their judgement, and which is

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able to take off the presumption which lyes against them, that *semel furibundus, semper furibundus præsumitur*. Whereas, in the case here contraverted, its prov'd, that the said *Jean* was at best of a very weak judgement, never able to converse with others, nor to administrate her own affairs; and at the time she made the Disposition, there is nothing proven which could have demonstrate her to have been in such a lucid interval, as might have sustained the act she was then doing, she having discours'd to no man at that time, nor so much as read the Disposition, which no wise person would have omitted, and having contradicted her Fathers expres will, without gratifying any of her other Relations.

But before any distinct answer can be return'd to the former representation, your Lordships will be pleased to consider, that the two greatest priviledges of mankind are, that by Nature he is a reasonable Creature, and that by Law he may freely dispone upon what is his own; Whereas, this unnatural Brother, designs to rob his Sisters memory of both these allowances, and by denying her every thing that is fit for a reasonable Creature, burdens himself to prove her a Brute. Somewhat is due to the modesty of her Sex, more to the being dead, (that great Sanctuary against all malice) but most of all is due to the name of a Sister; and therefore, seing by how much the danger is great, that may result from the probation, by so much the probation ought to be the more concluding and pregnant: It doth necessarily follow, that the probation to be deduced in this case, ought to be most conclusive, seing it tends to take away the greatest priviledges which were competent to the Defunct, either by Law or Nature. And albeit our Law allows not the depositions of Witnesses, to prove in cases exceeding one hundred pounds; yet, by this method, Dispositions of the greatest consequence may be enervat, upon the depositions of Witnesses, and that just Law not only disappointed, but cheated: and what danger are we exposed to, when two

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fellows may, by their aſſertions, prove us to be mad, after our death, and thereby diffame our memories, and alter our deſtinations? The ſettlement whereof, is the moſt ſerious earthly ſatisfaction which we have in that laſt Agonie.

It is very remarkable, that Law puts a difference betwixt fatuity and furioſity. Fatuous perſons, whom we call Idiots, are theſe who want ſpirit enough, *tardi*, *bardi*, *moriones*, *maccarones*, *qui inopia caloris & ſpirituum laborant*: But furious perſons are ſuch, as have too much heat and ſpirit; and our Law hath placed a diſtinction betwixt theſe two; for though neither Idiotry nor Furioſity can *regulariter* be proven, otherwayes then by the cognition of an Inqueſt upon Brieves raiſ'd out of the Chancellary, as is clear by *Craig*, and by the *66*. Act. 8. P. J. 3. which Inqueſt muſt conſiſt of fifteen neighbours, who knew the perſon who is alledg'd to be furious or idiot, and who muſt call for that perſon before them, and examine her; ſo zealous our Law hath been for our honour, and ſo jealous of Witneſſes. Yet, ſometimes it hath permitted open and notorious fury to be proven after the death of the furious perſon, as in the caſe cited; but no inſtance can be given, wherein Fatuity or Idiotry, was ever ſuſtained to be proven after the Idiots death: which was moſt reaſonable, for Idiotry conſiſting in the want of wit and judgment, which habitude is not ſubject to the ſenſes, but muſt be inferred by conference and conſequences, therefore it ſhould not be ſuſtained upon the depoſitions of Witneſſes ſimply, but upon the knowledge of an Inqueſt, who are in our Law both Judges and Witneſſes, and are in quality and prudence, above Witneſſes. And if a perſon can count their ten Fingers, they are not accounted Idiots, nor fatuous; for, *fatui ſunt* (as *Zackeus* obſerves) *illi tantùm qui omni ratiocinatione & judicio carent*. So that this Gentlewoman cannot be proven to have been fatuous, being now dead; but though ſhe were alive, and that the probation led might be legally receiv'd, yet ſhe cannot upon

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that probation, be ſaid to be fatuous, ſeing it is proven, that ſhe gave money to buy Neceſſars, that ſhe came to Table, went to Church, converſ'd with Neighbours, and ask'd for her Friends at ſtrangers who had ſeen them, and that ſhe carry'd her ſelf ordinarily as other Gentlewomen did, or ought to have done.

Lawyers ſometimes ſpeak of *imbecillitas & debilitas judicii eorum quæ ſenſum aliquem habent, licet diminutum*; and ſuch are by all Lawyers allowed to Marry, and make Teſtaments, *&c.* as is obſerved by *Gomez. Reſol. tom. 1. c. 6. Graſs. in § Teſtam. queſt. 21.* and thus it was decided, 27. *Octob.* 1627. in *Frizland*, as *Sand. lib. 2. Def. 2.* relates; and this at worſt is our caſe: for all that can be alledged againſt this unfortunat Gentlewoman, is, that ſhe was of a ſlow and dull humour, as Melancholians are, theſe hypocondriack vapours being to their Spirits, what ſtorms are to the Sea, which though they diſturb them for a while, yet cannot they hinder them from returning fully to their former calm.

Before I come to clear, that ſhe was not furious, your Lordſhips will be pleaſ'd to know, that *furor* is defined to be *dementia cum ferocia & horrenda actionum vehementia*; Fromanus, *de jure furioſorum, p. 6.* In Law he is ſaid, *omni intellectu carere*, l. 14. ff. de officio, preſid. *qui nec ſcire nec diſcernere poteſt*, l. 9. ff. *de acq. hæred. qui caret affectu*, l. 7. §. 9. *quib. ex cauſ. in poſſeſs. qui caret omni judicio*, l. 12. §. 2. ff. *de judici.* And becauſe prudence is *qualitas quæ ineſſe debet, ideo nemo præſumitur furioſus, ſed potius ſanæ mentis*; and two Witneſſes, deponing *de ſana mente*, are preferred and believed more then a hundred who depone upon fury, *Menoch. Lib. 6. preſumpt. 45.*

Lawyers divide fury, *in continuum, ubi animus continua mentis agitatione ſemper accenditur & interpolatum, ſeu intervallatum, qui dilucida habet intervalla, quorum furor habet indicias, & quos morbus non ſine laxamento aggreditur*, l. 9. c. *qui*

teſt. facere poſs. & quos furor ſtimulis ſuis variatis vicibus accendit, l. 6. C. *de contr. empt.* In whom fury is but an ague: madneſſe is but a diſeaſe in the one, but it is the temperament and the complexion of the other; in the one the judgment is but darken'd as by an eclipſe; but in the other, it lyes like the Cimmerians under a conſtant night. That this was not a continued fury, is clearly proven; for the depoſitions bear, that ſhe was only ſeiz'd with theſe fits that troubled her, twice or thrice in a year, and that at other times ſhe had, *non ſolum remiſſionem, ſeu adumbratam quietem, ſed etiam intermiſſionem & recipiſcentiam integram*, for they depone, at other times ſhe was as well as Gentlewomen are, or ought to be.

That which is contended then is only, that the lucid intervals are not clearly proven, at leaſt it is not proven that ſhe at the time of the ſubſcribing that Aſſignation, and for a conſiderable time before and after, was in a lucid interval; but the contrary will, I hope, appear from theſe poſitions.

Firſt, by the probation it will appear, that ſhe was never mad and furious; for ſhe at no time wanted all ſenſe and judgement, albeit ſhe was at ſometimes oppreſt with an overflowing and abounding melancholy, which diſtemper differs clearly from madneſſe, as *Zackeus* obſerves very well, *lib. 2. queſt. 9. Melancholici* (ſaith he) *ſunt timidi & merentes vel ridiculi; Furioſi vero in perpetuo motu audaces, ac præcipites.* And it will appear from the probation, that ſhe went to Table, to the Church, and to all Societies, which is not allowed to mad people; that in her fits, ſhe did only laugh and ſing, and when ſhe did begin to talk idlie, the leaſt ſign would have made her recover her ſelf, which is a clear ſign of melancholy, but no wayes of madneſs. And the Father, who beſt knew the condition of his own daughter, was ſo far from thinking her mad (as is pretended) that he left her a conſiderable portion, which implyes not only a liberty, but an invitation to Marry: Whereas if he had thought her mad, doubtleſſe he had only

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leſt her an Aliment, but no Portion, and would have recommended, that ſhe ſhould not Marry; for what Father deſires to have his Family diſgraced, by giving out a mad Daughter? And the Phyſitian alſo depones, that ſhe was only troubled with a melancholy; which humour, though when it boils over, will occaſion great diſtempers, yet, that ſtock of vapours being ſpent, the Brain returns, or rather continues, in its natural and exact temper.

2. The Witneſſes who depone can give no ſuch account of their *cauſa ſcientiæ*, as can infer madneſſe, for ſhe being, as they confeſs, alwayes removed to her Chamber, when her diſtemper did ſhew its firſt twilights, they could not exactly know that habit of the minde, that is neceſſar to be known in ſuch caſes; Whereas, the *cauſa ſcientiæ* they give is, that they heard her commonly repute mad: And one depones, that paſſing by her Chamber-door, he ſaw her laugh and ſing, and heard her talk idly, which was too tranſient a way to know the nature of a diſtemper, which the Law ordains to be known by conference, and frequent converſation.

3. Albeit in Law, *Semel furioſus ſemper præſumitur in furore perſtitiſſe*, yet when lucid Intervals are once proven, as is very clearly proven here, *Quod actum erat, potius præſumitur in dilucido intervallo, quem in furore geſtum, ſi actus ita geſtus fuerit, ut nullum ſtultitiæ ſignum appareat.* This *Maſcard.* gives for a rule, *concluſ.* 826. and there he cites, *afflict. deciſ.* 143. *Jaſon. ad. l. furioſum, C. qui Teſtamentum facere poſſunt*; and *Covarr. de ſponſal.* part 2. cap. 2. And thus the Roman Senat decided of old in *Teſtamento* Tuditani, cited by *Val. Max. lib.* 7. *cap.* 8. So that albeit where the Intervals are not proven, it is requiſit, that *actus ſapientis*, and the condition of the perſon before and after for a conſiderable time, be proven, to make the act appear to be wiſely done; yet, where the lucid Interval is proven, *actus ſapienti conveniens* for the preciſe time is ſufficient; for els

the proving *prior* lucid Intervals ſhould be unneceſſar, ſeing though *prior* lucid Intervals were not proven, yet it would be ſufficient, that the act were *actus ſapientis*, for that *per ſe* is excluſive of madneſs.

4. The Nottar doth aſſert in the Aſſignation, that at the time ſhe was of a ſound judgement, upon which certainly he would have depon'd, had he been alive, ſo that he is now a proving Witneſſe: and *Froman. p.* 81. thinks the Nottars aſſertion in ſuch a caſe of great moment. But above all, that which convinces me is, that Sir *Thomas* being interrogat upon his oath, whether he believ'd ſhe was then of a ſound judgment, doth depone affirmative, and though this be only an oath of calumny, yet it is equivalent to an oath of verity, nor do they differ; Nor could an oath of verity be more expreſs, and ſo not more proving.

And whereas it is contended, that this Act was of its own nature, rather a ſign of madneſs, then of prudence; ſeing ſhe did not read over the Aſſignation which ſhe ſubſcrib'd, and ſeing ſhe oblieged her ſelf therein, not to marry without her Fathers conſent, and that ſhe therein altered that deſtination made by her Father:

It is anſwered, that at the time of her ſubſcribing that Paper, ſhe deſired that a Nottar might ſubſcribe for her, becauſe ſhe could not write; and when the Nottar told her that ſhe behov'd to ſubſcribe her ſelf, elſe the Paper would be null, ſhe called for it then and ſubſcribed the ſame, which ſhew that ſhe could reaſon and deduce conſequences, and that ſhe deſired earneſtly to have her Brother Sir *Thomas* ſecure of what ſhe did; and albeit women can (becauſe of there ſex and imployments) ſhow but little *ſagacity*; yet in this ſhe diſcovered *actus ſapientis*, as well as *ſapienti conveniens*. And albeit it be not proven, that the Paper was not read over, yet ſince the contrary is not proven, it muſt be preſumed to have been done, *per argumentm à ſolitis*. And ſeing Sir *Thomas* was the eldeſt Brother, and had entertained

both

both her and her Mother, it was moſt reaſonable that ſhe ſhould have left him her Eſtate, being the ſtock of the Family; and ſhe being bred up in a kindneſs for him by their Mother, whoſe choice ſhe was oblieged to approve, being then in one Family with them, and her only Parent. And it was moſt juſt, that her eldeſt Brother coming in place of her Father, ſhe ſhould have taken his advice in her Marriage: which advice was not in Law binding, nor would ſhe have fallen from the right of her Proviſion, though ſhe had refuſed his advice; ſo that in this, ſhe honoured her Brother, and pleaſed her Mother, without prejudging her ſelf.

Secure then (my Lords) in this precedent, our Names againſt infamy, and our Eſtates againſt the lubricity of Witneſſes, and arbitrarineſs of Judges; and give not occaſion to Witneſſes in one Act, to perjure themſelves, and ruine us and our Poſterity: And gratifie not the avarice of a Brother, who digs up the aſhes of his defunct Siſter, to find that ſacrilegious Prey which he hunts after; but let him ſee by your ſentence, as an earneſt of Gods juſt judgement, what he deſerves *who calls his Brother a fool*, much more, who for money takes pains to prove his Siſter ſuch.

This Caſe was ſubmitted to the Lords, and the Sum was divided equally by them, as Arbiters.

For

For the Laird of *Miltoun*, againſt the Lady *Miltoun*, November, 1669.

SIXTH PLEADING.

In what caſe a Sentence may be redu'd, by a Reprobator *of the depoſitions of the Witneſſes whereupon the Sentence was founded, and by what probation Sentences may be reprobated.*

I Tremble (My Lord) to think, that the Fortunes of the beſt of His Majeſties Subjects, ſhould be, by the fatal neceſſity of our Law, laid open to the malice and avarice of the meaneſt, and worſt Witneſſes: And though we know, there be thouſands who would hazard their own damnation, to ſatisfie either their revenge or avarice; yet if any two of theſe Witneſſes, ſhould conſpire to ſatisfie their deſigns, either by deponing that which is abſolutely falſe, or by concealing what is really true, to the ruine of our Lives or Eſtates, it is pretended, that our Law hath invented no civil remedy. This (my Lord) were to make the Law authorize the robbing of Innocents, and to ſuffer no man to poſſeſſe his Fortune, longer then two Raſcalls pleaſes; Wherefore, it is my deſign, to vindicat both our Law, and my own Client, and to ſhow that your Lordſhips juſtice is appointed as a City of refuge, and that you can, by your Reprobators, defend us againſt

againſt their depoſitions. But becauſe this ſubject hath been but very unfrequently and darkly handled amongſt us, albeit it have in it very much both of intricacy and concernment; I hope your Lordſhips will allow me ſo much more of time; and ſeing *ex facto jus oritur*, I ſhall, to the end the point of Law may be the better underſtood, thus open to you the matter of Fact.

The deceaſt Laird of *Miltoun* did match himſelf in a ſecond Marriage to this Lady, to whom he did, with the greateſt part of his Eſtate, give his chief Houſe in Jointure; and after his deceaſe, ſhe having married *John Maxwell* her preſent Huſband, they did take as much pains to deſtroy the houſe, as the Law oblieges them to take in preſerving it: which abuſes did put a neceſſity upon Sir *John Whitefoord* my Client, to whom the Eſtate belongs, as Son and Heir to the deceaſt *Miltoun*, to buy the ſaid *Maxwells* right, which he had to her Jointure *jure mariti*; and after that her Husband and ſhe had received a ſufficient price for it, they did enter upon an unworthy deſign, of retaining both the Land and the Price; and in order thereto, it was plotted, that the Husband *Maxwell* ſhould go off the the Countrey, and that this Lady his Wife ſhould purſue a Divorce againſt him, as having committed Adultery; During the dependance of which Proceſs before the Commiſſars, finding, that the Reduction of this Right (which fell in conſequence of the Reduction of the *jus mariti*) was chiefly aim'd at, *Miltoun* offer'd to appear, and object againſt the Witneſſes, who were led to prove the Husbands Adultery, and which Witneſſes were perſons known to be of very torn and unſound fame, and very lyable to all impreſſions; but he was not admitted: whereupon he rais'd Reduction of the Commiſſars Decreet before your Lordſhips, upon ſeveral reaſons; two whereof were, 1. That the Lady had brib'd the Witneſſes. 2. That ſhe had ſuggeſted to them what they ſhould depone, inſtructing them what Faces and Cloaths theſe Women had; which

which reasons your Lordships found not competent by way of Reduction, but by way of Reprobator.

When this Reprobator was, in obedience to your ordinance rais'd, it was alledg'd, that there could be no Reprobator now pursued, since it was not protested for, at the time when the Witnesses were led; but this was repell'd, both because your Lordships had reserved a Reprobator already, which was equivalent to a Protestation; and because the grounds of this Reprobator are but lately emergent, since the receiving of the Witnesses, and were not then known. And as *Durandus*, that learn'd Practitian observes, *tit. de reprob. testium, num. 2. Quod si actor paratus sit jurare, quod ad hoc, ex malitia non procedit, vel quod post publicationem, didicit id quod nunc objicit, tunc auditur sine protestatione*; and cites for this, *cap. presentium extra de test.*

The Lady finding her self in hazard to loss both her Jointure and Reputation by the event of this pursute, she now alledges, that these grounds of Reprobator are not relevant, nor receivable; 1. Because when Witnesses are sworn they are purg'd of partial counsel, of the receipt or expectation of good deed; so that this being *res hactenus jurata*, it cannot be thereafter search'd into by him who referr'd the same to Oath, *& detulit juramentum*; *nam dum detulit, transegit.* 2. Though the corrupter or suggester may be punish'd *pana falsi*, yet the sentence pronounced upon these depositions, can never be reduced. 3. If this were allow'd, there should be no end of Pleas, *sed lites essent immortales*; for the first Witnesses might be reprobated by other Witnesses, and these by others, and these by others; *& sic daretur progressus in infinitum.* 4. Though corruption were receivable, yet it were only probable by the Oath of him who obtain'd the Decreet.

Before I come to make particular answers to the difficulties proposed, I shall remember your Lordships in the general, that Probation being defined by Lawyers to be, *fidem facere Judici*

Judici, to convince the Judge of what is alledged, probation by Witneſſes is no infallible, but only a preſumptive probation; for it is founded upon no other warrand, then that it is preſumable, that two diſ-intereſted perſons will not, by looſing of their own ſouls, gain any thing for a third party; ſo that this kind of probation ſeems rather to be introduc'd by neceſſity, then choice. And albeit at firſt, when the fear of a Deity did ſway the World, and before men had abſolutely loſt their primitive innocence, and in place of it had learn'd thoſe cheats and falſhoods, which have grown up with time; that probation ſeem'd to be very well founded, and two Witneſſes were ſufficient in all caſes: yet, Lawyers finding infidelity daily to grow, have accordingly daily leſſened their eſteem of that proof; ſo that the civil Law did begin to require ſometimes five, ſometimes ſeven Witneſſes: our old Predeceſſors eſtabliſh'd Aſſizes of fifteen ſworn neighbours, who becauſe they were both Judges and Witneſſes, had liberty to allow as much of the depoſition of Witneſſes, as they thought fit; and thereafter, upon furder experience, it is ſtatute with us, that no Witneſſes can be received in caſes above a hundered pounds: and in *Holland*, *Italie*, and ſeveral other Countries, the depoſition of Witneſſes cannot prove a crime, and are made no further uſe of, then to ſubject to the torture, the perſon againſt whom they are led.

Lawyers have likewiſe, as a furder check upon theſe depoſitions, even in theſe caſes when they are neceſſar, ordain'd the puniſhment of perjury to be ſevere, *ob vindictam publicam*, and allow'd an action of Reprobator for redreſſing of the parties wrong'd, ſuitable to the two wrongs which Witneſſes commit in their falſe teſtimonies; in the one whereof they prejudge the Common-wealth by the example, and by the other, the privat party, in the depoſition it ſelf.

Reprobator is by Lawyers defined to be, an action, whereby the Judge reſcinds a former Sentence, becauſe of the falſeneſſe

of the deposition, or becauſe of the corruption of the Witneſſes. And the depoſition of every Witneſs hath in it two parts, *viz. Initialia teſtimoniorum, & dicta teſtium: Initialia teſtimoniorum*, are, the previous circumſtances premiſed by the Practique to the depoſitions, whereof the chief are, Whether the party be married? of what age they are? where they dwell? *&c.* which would be very impertinent interrogators, if the Law did not intend to make uſe of theſe, as marks, whereby to try the faith and truſt of the deponers. There are likewiſe other interrogators, which, though they be uſed as *Initialia*, yet certainly are *eſſentialia*, and grounds of Reprobator, though the Witneſſes do not at all depone upon them; ſuch as, Whether the party hath ſuggeſted to them what they ſhould anſwer? or hath corrupted them? yet, the parties uſe ordinarily to depone, if they get good deed, or were inſtructed. The *dicta teſtium* are the body or matter of the depoſitions, which relate principally to the thing contraverted; and albeit ſome Lawyers diſpute, whether the depoſitions of the Witneſſes can be reprobate *quoad dicta teſtium?* becauſe the Witneſſes are there *conteſtes*, and when two of them agree in one, to reprobat theſe were in effect to overturn a formall probation; yet in *initialibus* they are not *conteſtes*, but every one depones ſingly upon what concerns himſelf, and is likewayes concern'd himſelf in what he there depones; ſo that in theſe, both ſingularity and intereſt derogat very much from the truth of what is depon'd; and in this caſe, I intend not to quarrel the *dicta teſtium*, but the *initialia teſtimoniorum*.

Theſe grounds being laid down, my anſwer to the firſt difficulty is, that the firſt defence, wherein it is contended, that the Witneſſes having been interrogat, whether they were brybed or inſtructed? and having denyed the ſame upon Oath, their depoſitions cannot be now reprobated, upon the heads of ſuggeſtion or corruption, is moſt irrelevant, for theſe

reasons; 1. The party against whom the Witnesses are led, hath no time allow'd him to enquire what the Witnesses are, who are to be led, and though he have relevant objections, *v g.* if he be inform'd, that they are instructed or corrupted, he must instantly verifie these objections, els they are not receivable; so that to deny him the liberty of causing the Judge purge the Witnesses, by their Oath, of any suspition, were in effect to take from the party his greatest security; and sure, no person would desire that purgation, if he thought that he would be thereby cut off from the benefit of Reprobator. 2. If this were allow'd, it were easie to cut off all Reprobators; for the leader of the Witnesses might still cause purge them, and oftimes the Judge doth it, *ex proprio motu*; neither is it marked in the deposition, whether the Witnesse is purg'd by the Judge at the desire of the Pursuer or Defender, but singly, that he being interrogat, depon'd, *&c.* So that in this case the person, against whom the Witnesses are led, should be prejudg'd without any act of his own. 3. Though a Witness have purg'd himself of partial counsel, yet if he depone falsly, he may be pursued by him, against whom he depon'd, for perjury; *Ergo*, it is much more competent to the person, to pursue Reprobator in that case; for Reprobator being but a civil Action, is far lesse dangerous. 4. *Juramentum purgationis* is not *juramentum decisivum*, and is taken, as Lawyers say, *non ad finalem decisionem, sed ad majorem cautelam*, and being introduc'd for the advantage of the party against whom the Witnesse is led, it were most unjust that it should be detorted to his prejudice. 5. A Witnesse who purges himself of partial counsel, is but *unicus testis*, and depones upon his own innocence, and consequently doth not prove; and it were most unjust, that he should in that case be better believ'd, then two famous Witnesses *omni exceptione majores*, and who depone upon his prevarication; and if this priviledge were given to an Oath of purgation, it would tempt men to lead

debauch'd Witneſſes, and them, when they are led, to depone arbitrarily; knowing that they can by their own Oath, clear themſelves of any thing that might be objected againſt them, and that the Oath which they give, cannot only ſecure the party for whom they depone, but themſelves againſt all hazard. And laſtly, Lawyers who have treated very largely of this ſubject, have made no ſuch diſtinction as this, but on the contrair, by doubting only, whether *dicta teſtium* can be reprobat, becauſe the Witneſſes there are *conteſtes*, as ſaid is; They clearly inſinuat, that in all caſes, where the Witneſſes are not *conteſtes*, their depoſitions may be reprobat.

To the ſecond defence, wherein it is contended, that the effect of a Reprobator is not to reduce civilly the Sentence, *nam ſententia ſemel lata pro veritate habetur*; but that the only effect of it would be, to puniſh the parties corrupters, or the Witneſſes corrupted, by a criminal Sentence. To this it is anſwered, that the alledgance is contrary to the grounds of all Law, and to the opinion of all Lawyers. 1. A Reprobator is in their opinion, *ſpecies reviſionis*; as is clear by *Farin. Durandus, practica Ferarien.* and many others, and *Reviſio*, in the dialect of Lawyers, is the ſame thing that Reduction is with us. 2. Seing Witneſſes wrong both the Commonwealth by the example, and the privat party by the depoſition, and ſince it is very juſt, that every wrong ſhould have a ſuitable remedy, and ſeing the prejudice done by the example, is only remedied by the criminal Action; it is neceſſar, that the party læs'd ſhould be aſſiſted by a civil Reduction: and it ſeems very unjuſt, that the Witneſſes ſhould be puniſh'd criminally, and that it ſhould be acknowledged, that the party was wronged by the falſe witneſſes, and that yet the loſſe ſhould not be repair'd. 3. *Per l.* 33. *ff. de re judicata* (which I may call the fundamental Law of Reprobators) It is clear, that both a civil and a criminal remedy are granted: the one, in theſe words, *rem ſevere vindica*, and the other, in theſe words, *in*

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integrum reſtitue. The Law it ſelf runs thus, Hadrianus *aditus per libellum à* Julio *tarentino, & judicante eo, falſis teſtimoniis, conſpiratione adverſariorum, teſtibus pecunia corruptis, religionem judicis circumventam eſſe, in integrum cauſam reſtituendam; in hæc verba reſcripſit, exemplum libelli dati mihi à* Julio *tarentino, mitti tibi juſſi, tu, ſi tibi probavaris, conſpiratione adverſariorum, & teſtibus pecunia corruptis, oppreſſum ſe, & rem ſevere vindica; & ſi quæ à Judice, tam malo exemplo circumſcripto judicata ſunt, in integrum reſtitue.* Which is likewiſe confirm'd, *per l. ſi quis c. de adult. Et ita voluerunt* Alexander, *conſil.* 148. *&* Lud. Bologn. *conſil.* 5. And by our Practique, Sentences have been reduc'd, and the Party repon'd, when the depoſitions whereupon the Sentence proceeded, were convell'd by a Reprobator: clear inſtances whereof are to be ſeen, the 23. of *June*, 1633. and 22. of *December*, 1635. And upon the 5. of *March*, 1624. in an action of Reprobator rais'd againſt a Divorce, it was found, that the offering to corrupt one of the Witneſſes, was ſufficient to reduce the Decreet of Divorce: Whereas, here it is offered to be proven, that both the Witneſſes were corrupted, and if the depoſition could not be quarreled in order to a civil effect, there needed no Reprobator at all; for the criminal action of Perjury would reach the other effect, and the Lords of Seſſion, before whom Reprobators are intented, would not be at all Judges competent. 4. This opinion, both of the Civil and of our Law, is founded upon very juſt Principles; for the Sentence being in that caſe founded upon the depoſitions, theſe being removed, the other ſhould fall in conſequence, *nam ſublata cauſa, tollitur effectus*; and therefore, Lawyers ſay, that *teſtes reprobati pro non teſtibus habentur*, Durand. *ibid.* and to allow a Decreet after Witneſſes were reprobat, were in effect, to allow a Decreet without probation. 5. When a Decreet is founded upon a Writ, if that Writ be found falſe, the Sentence is reduced, as is clear by the whole Title, *Cod. Si falſis inſtrumentis,*

mentis, &c. and therefore, much more ſhould Decreets be reduced, depending upon the depoſitions of Witneſſes which are reprobat, there being at leaſt *eadem paritas rationis*.

As to the third difficulty propoſed, which is, that this would *progredi in infinitum*, and there ſhould be no end of Plea's, which objection is propon'd by *Abbas*, *ad cap. propoſuiſti de probat.*: It is anſwered, that this Argument, if it prove any thing, will prove that no perjury ſhould be purſu'd, nor proven; becauſe, it is urg'd in this caſe, it may be urg'd there likewiſe, that theſe Witneſſes who prove the perjury, may be proven perjur'd by others, and theſe by others; and by the ſame argument alſo, we ſhould have no Aſſiſes of Error, becauſe, if a firſt Aſſiſe may be tri'd for error, why not that Aſſiſe by another, *&c.* But this difficulty is eaſily ſav'd, for Reprobators ſhould not be ſuſtain'd in all caſes, and it is only *remedium extraordinarium ex nobili officio proveniens*, and ſhould only be granted, when the reaſon of Reprobator is found moſt relevant, and is offered to be proven by Witneſſes *omni exceptione majores*; and to deny it in that caſe, were great injuſtice. As for inſtance, if I ſhould offer to prove, that albeit it were proven by two fellows, that I married *Bertha* in *Paris* ſuch a day, whereas I offered me to prove, that the ſame day I pleaded before your Lordſhips in this Houſe, and which were notour to all your number, were it not unjuſt to refuſe to reduce a ſentence, which were founded upon that firſt probation?

It is moſt groundleſly alledged in the laſt place, that though corruption of Witneſſes were allowed to be reprobated, by an Action of Reprobator intented before a Deciſion in the principal Cauſe; yet no Reprobator could be purſu'd, after a Decreit obtain'd in the principal Cauſe; for els no ſingular Succeſſor could be ſecure, ſince his Right might ſtill be reduced or reprobated by Witneſſes, and ſo Sentences could be no ſufficient ſecurity to ſuch as were aſſigned to them; as alſo, *poſt publicata teſtimonia & ſententiam*, the loſſer of the Cauſe ſhould ſtill intent Reprobator,

Reprobator, knowing what the Witneſſes depon'd; at leaſt the corruption of the Witneſſes, ſhould not be then probable any other way, then by the Oaths of the corrupter himſelf. To which it is anſwered, that Reprobators are in Law allow'd, aſwell *poſt ſententiam*, *quam durante primo proceſſu*, as is clear by *Farinacius* and others; and there is no hazard of the publication of the Teſtimonies, becauſe the queſtion is not, whether the Teſtimonies *& dicta teſtium* can be reprobated? for that is not here contended, but whether the *initialia* can be reprobated, which *initialia* uſe to be interrogat in preſence of the Parties, and ſo there is no hazard of publication there: nor did ever any Lawyer alledge, that corruption was only probable by the corrupters oath, and this were moſt unreaſonable, as will appear from theſe Arguments, 1. Corruption is *facti* and falleth under ſenſe, and therefore is of its own nature probable by Witneſſes. 2. Corruption could caſt or ſet a Witneſs, before he were examined, and *eo caſu* would be probable by Witneſſes, why not then after he has depon'd? for by our Law, as by the Civil, *noviter provenientia ad notitiam & emergentia*, are receivable and probable, *eodem modo & ordine*, as they ought to have been, if they had been ſooner known; and ſeing all objections againſt Witneſſes, are only receivable with us, if they be preſently proven, it were unjuſt not to admit emergent Objections or Proofs. 3. This were to make Witneſſes moſt licentious and arbitrary, for the Parties may give, and the Witneſſes take bribes, *ſub ſpe impunitatis*, if they knew that they could not be found out, but by their own confeſſion, and in effect this were to allow perjury, and to invite men to it. 4. It is moſt preſumable, that theſe who have brib'd, will perjure, and ſo their oaths cannot be believ'd; and therefore, the Law muſt either declare, that corruption is no ground of Reprobator, els that it is probable by other Witneſſes, and *media probandi*, then the oaths of the bribers, or bribed. It was never denied, but that a Decreet obtain'd by colluſion of Advocats or Clerks, might

might be reduc'd, upon full probation of the colluſion by the oaths of thoſe Advocats or Clerks, elſe any of theſe by compearing, or omitting a Defence, might bind one hundred thouſand pounds upon any of the Lieges: and ſince it is conteſt, that the Civil Law and the Doctors do in this caſe allow probation by witneſſes, I ſee not why our Law ſhould not admit it. They were as zealous for the Authority of Sentences, as we are, and Perjury is more frequent now then of old; and though our Law doth not allow probation by Witneſſes, in caſes above one hundred pounds, yet that Law was only made to regulate the original probation of Debts in the firſt inſtance, but not the reprobating Sentences. And it were againſt reaſon and juſtice, that a Decreet that was obtained upon the depoſitions of Witneſſes, ſhould not likewiſe be quarrelable upon the depoſitions of other Witneſſes proving corruption, theſe reprobating Witneſſes being above exception, and ſuch perſons as the Judges may think fit to admit, whoſe choice will in this caſe, cut off the hazard of a *proceſſus in infinitum*: Seing it is not probable, that Judges will allow any ſuch perſons, as may endanger the intereſt of him againſt whom they are led, this power can be no where more ſecurely depoſitat, then in this Illuſtrious Senat, whoſe frailty is much leſs to be jealous'd, then is that of Witneſſes; and though the conſtitution of a Debt cannot be prov'd by Witneſſes, where there is no other probation; yet it follows not, that a Decreet founded upon a matter of fact, and upon the depoſitions of Witneſſes, may not be taken away or reprobated by other Witneſſes: for, though where Debt is lawfully conſtitute, it cannot be taken away by Witneſſes, yet the caſe here contraverted is, whether the Debt was lawfully conſtitute? and the alledgeances are corruption, *alibi* and other matters of fact; and though a Decreet has interveen'd, yet that doth not ſo alter the nature of the thing, as to make it leave to be a matter of fact, and the defences emergent, ſince the Decreet and matters of Fact are ſtill probable by Witneſſes.

It

It is unjuſt, that what was firſt purchaſed by Witneſſes, ſhould not be tryed by the depoſitions of Witneſſes, *Eum debet ſequi incommodum, quem ſequitur commodum; & nihil eſt tam naturale, quam unumquodque eodem modo reſolvi, quo colligatum eſt.* And as when I purſue upon a falſe Bond, the falſhood of that Bond is to be tryed by Witneſſes, our Law doth not force the Defender to refer the truth of the Debt, or of the matters of Fact, to the oath of the Purſuer: Even ſo, when a man is purſued upon a Decreet, which is obtain'd upon falſe grounds or corruption, why ſhould our Law force me to refer the truth to the Purſuers Oath?

Sure, if ever Reprobator was granted, it ought to be in this caſe; wherein my Client offers to prove, that this Lady (whoſe Sex I am loth to wrong in her perſon) did bribe theſe Witneſſes, and inſtructed them *verbatim* what they ſhould depone; this is offered to be proven, not only by their own confeſſion, but by the depoſition of many, who are more numerous, and more famous, though their own confeſſion proves them to be vaccillant, and faithleſs Raſcalls, and who though they ſhould not be believ'd in any caſe, yet ought to be believed as well in this retraction, as in their firſt depoſition, and who can enervat, though they cannot aſtruct, their own teſtimonies; and this probation ought to be received, againſt the depoſition of two Villains, who ſtand condemned by common fame, which is ſufficient to hinder them from being Witneſſes *omni exceptione majores*, and are condemned by the Kirk-ſeſſion for keeping Baudy-houſes, wherein they have ſhak'd off that fear of God, which is the ground of the Faith we give to Witneſſes, and have learned by pimping perſons, to pimp Plea's. I am here in defence of a Marriage, *quæ eſt cauſa maxime favorabilis*, and the diſſolution whereof requires a probation *per teſtes omni exceptione majores*; and it is very probable, that a woman who is ſo impatient in thoſe holy Bands,

and ſo malitious againſt her own Husband, as to aſperſe him with every thing that may leſſen his reputation with your Lordſhips, would not ſpare to have dealt ſo with the Witneſſes, as might beſt effectuat her deſigns, knowing that if ſhe prevail'd not, ſhe behoved to return to the ſociety of a Husband, whom ſhe had ſo highly diſoblieged, to miſſe the enjoyment of that Jointure, which ſhe ſo ardently expected; and to be juſtly branded, for having ſo malitiouſly and cauſeleſly defam'd ſo ſacred a Relation.

The Lords ſuſtain'd the reaſons of Reprobator *to be proven by Witneſſes,* omni exceptione majores.

For the Lord *Balmerinoch*, againſt the Lady *Coupar*, Feb. 1670.

SEVENTH PLEADING.

How far a Diſpoſition, made by a man, in favours of his Lady, of his whole Eſtate, is reduceable, as done in lecto ægritudinis.

MY Clients (My Lord Chancellor) this day, are not the Lord *Balmerinoch* only, but all ſuch as either may be Heirs, or Husbands; And by how much greater there Eſtates are, by ſo much the more they are concern'd in this diſcourſe: wherein I deſign to aſſiſt them when they are upon death-bed, which is an occaſion, at which not only their wit and memory leave them, but wherein they are oft deſerted by all other Friends, beſides theſe who deſign to prey upon them. And I am ſo zealous in this ſervice, that I cannot detain my ſelf any longer, from opening to you the matter of fact in this Cauſe, which may be ſaved by its very merits, if ever any was.

The caſe (my Lord) ſtands thus. The late Lord *Cupar* had, by his Fathers kindneſſe, and out of the Eſtate of the Family, a conſiderable Fortune beſtowed upon him, and what addition it has receiv'd ſince, is rather the product of ſo conſiderable a ſtock, then of that Lords induſtry: ſo that he having died without Heirs, this Eſtate ſhould have return'd to the

Family, not only by a legall ſucceſſion, but by the rules of gratitude. Yet having in a ſecond Marriage, at the Age of threeſcore and ten, married a Lady, by whom he got no great Fortune, ſhe induc'd him to diſpone his whole Eſtate, Honours and Title in her favours, and in favours of the Children to be procreat betwixt her and any other Husband (the firſt bribe was ever given by a dying Husband, to invite a Wife to a ſecond Marriage, and though a Brother may raiſe up ſeed, yet we never hear, that a Woman rais'd up ſeed to her Husband) of which Diſpoſition, there is a Reduction rais'd by the Lord *Balmerinoch*, who is Nephew to the Defunct, and ſhould have been his Heir, wherein he quarrels this Diſpoſition, as made upon Death-bed by the Lord *Coupar*, after contracting of that ſickneſs, whereof he died, and as done in prejudice of him as appearand Heir.

My Lord, I know, that *Legis eſt jubere, non ſuadere*, and that *omnium quæ fecerunt majores noſtri, non eſt reddenda ratio*; yet, this Law, or rather ancient cuſtom, whereby perſons upon death-bed can do nothing in prejudice of their Heirs, can juſtifie it ſelf equally well, by Reaſon and Authority.

The reaſons inductive of this excellent Law, are firſt, That after men are ſick, their judgements grow frail with their bodies; and the ſoul of man wants not only then, the pure miniſtry of well-diſpoſed Organs, but is likewiſe diſordered by the infection of the languiſhing body; wherefore the Law obſerves, *lib. 2. Reg. Maj. cap. 18. verſ. 9. Quod ſi quis in infirmitate poſitus, quaſi ad mortem, terram ſuam deſtribuere caperit, quod in ſanitate facere noluit, præſumitur hoc feciſſe ex fervore animi potius, quam ex mentis deliberatione.* Which preſumption ſeems to be very well founded; for it is not imaginable, that any man who is reaſonable, would pull down his own houſe; and Nature and Reaſon being the ſame thing varied under different expreſſions, he who overturns the one, cannot be found in the other. The ſecond reaſon is, becauſe men ordinarily

rily upon Death-bed, being ſurpris'd with the approach of death, and terrified with the proſpect of what follows it, do ſo little value the affairs of this world, which they begin now to find ſo little able to repay their criminal pains and love, that to evite the importunity of ſuch aſſiſtants, as are like Vultures, buſie about the Carrion upon ſuch occaſions, they are content to ranſome time and quiet, with the careleſſe loſſe of their Eſtate; and who would not buy time then at a dear rate? So that this Law is the great fence of our ſick-bed, as well as of our infirm judgments. The third reaſon is, the great reſpect our Law bears to ancient and Noble Families, who are the corner-ſtones of the Kingdom, to whoſe valour, our Law has oft ow'd its protection, and ſo could not refuſe its to them. And ſure, if either the importunity of Mothers, for their younger Children, or of Wives for themſelves, could be ſucceſsful, the Heirs would ſucceed to a heavy and empty Title: and upon this conſideration, the Parliament did lately refuſe to allow Parents the power of providing their younger Children to ſmall Portions, upon Death-bed. I know alſo, that ſome adde, as an original reaſon for this Law, the avarice of Monks, and Church-men, who perſwaded men to Wodſet for themſelves rooms in Heaven, with great Donatives to pious uſes; to reſtrain which exceſſe, *Venice* and other Kingdoms have taxt the value of what can be ſo beſtow'd. And albeit the reſtriction impoſed by this Law, may ſeem deſtructive of *Dominium*, which is *jus diſponendi*, and that by the Law of the 12. Table, *Ut rei ſuæ quiſque legaſſit ita jus eſto*; So that this ſeems to want all foundation either in common, feudal, or the Laws of other Nations. Yet, if we examine, we will find *Dominium* is in very many moe caſes then this, and in more favourable, reſtricted by all Laws; and that *quærela inofficioſi Teſtamenti*, is founded upon the ſame reaſon with this Law; and that by the Laws of *Spain* and *Flanders*, (ſo great is the favour of Noble Families) Noblemen cannot at any time

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diſpone their Eſtates, but muſt tranſmit to their Poſterity, what ever Lands they got from their Predeceſſors. But though no Nation joyned with us in this Law, this ſhould rather induce us to maintain it, as being truly a Scots Law; and we muſt be ſo charitable to our Predeceſſors, as to believe, that they would not without very cogent motives, have reſtricted their own power of diſponing, and have receded from the cuſtom of all other Nations; and we ſhould be as carefull of our fundamental Lawes, as the Spainiards are of their privat Eſtates. And of all perſons, againſt whoſe importunity the Law ſhould guard us, ſure our Wives are the chief, for they have the neareſt, and frequenteſt acceſſes, the moſt prevailing charms and arguments, and of all creatures women are moſt importunat, and are moſt dangerous when diſoblieged; wherefore the Law hath wiſely forbidden all Donations betwixt man and wife, fearing in this, mutual love and hatred, though in modeſty, it hath only expreſt the firſt. And ſure if this Donation ſhould ſubſiſt, every woman would think her ſelf affronted, as well as impoveriſhed, if ſhe could not elicit a Diſpoſition from her Husband, of ſome part of his Eſtate. And to what condition ſhould a poor man be reduc'd, and with what inconveniences urg'd, when he behoved either to diſobliege his Wife, or ruine his Heir, and to load his Fame or his Eſtate. So that the Lord *Coupar* hath in this, prejudg'd Husbands and Heirs, and hath violated *& jus Parentale, & Maritale.*

It is alledged for the Lady, that the reaſon is not relevantly libelled, ſeing we do not condeſcend upon a form'd diſeaſe, under which the Lord *Coupar* laboured the time of the Diſpoſition, and of which diſeaſe he thereafter died: Nor is tenderneſs and infirmity ſufficient of it ſelf, to maintain this reaſon of Reduction, eſpecially in old men, whoſe age is a continual infirmity, and yet is not by Lawyers called a ſickneſs, ſickneſs being a preternatural, whereas age is a natural infirmity. And this Law being mainly

mainly founded upon the presumption, that these who are upon death-bed, have their Judgments and Memories so clouded, and disordered by the sickness which presseth them, that they are either altogether disabled from doing affairs, or at least from doing them judiciously, and according to the rules of reason: therefore such a disease should be condescended on, as influences the judgment, and incapacitats the Disponer to understand his own affairs. Whereas it were absurd that old men who keep the house, should be generally interdicted, meerly because they come not abroad, and are somewhat tender, albeit they be otherwise very ripe and mature in their judgment, as ordinarly old men are, Nature having bestowed Prudence upon them, in exchange of that bodily vigour, which remains with those who are young: and it were unreasonable, that if any Person were a little tender, and had not occasion thereafter to come abroad, that a Disposition made by him should *ex eo capite* be reduced, albeit it cannot be qualified that he died of that disease. Wherefore our Law having restricted the power of Heretors so far, that as they cannot dispone their Estate upon Death-bed, in prejudice of their Heirs, it hath most justly appointed, that the disease wherewith they are infected should be condescended upon; to the end it may be known, whether it could influence the judgment or not, or whether or not the Disponer died of that disease: and in all the decisions which concern cases of this nature, it is remarkable, that the disease is still condescended upon. Likeas. by the 18. *cap. lib.* 2. *Reg. Maj.* The reason whereupon this Law is founded, is said to be, *quia tunc posset in modico contingenti ejus hæreditatem destribuere, si hoc permitteretur, ei qui fervore passionis instantis, & memoriam, & rationem amittit.*

To which it is reply'd, that it is libel'd in the reason of Reduction, that the Lord *Coupar* Disponer had contracted a sickness, before he had granted the Disposition, which is all is necessar; And it were most absurd, to think that the Pursuer should be necessitat to condescend upon a particular disease, and design it by

a Name: For this were to make two Physitians absolutely necessar in all diseases, since none are presumed to know the Names and Natures of diseases but they; and there is sometimes such a complication of diseases, and new diseases do so often creep in amongst mankind, that hardly even a Physitian can design them exactly by a particular Name. And it is very observable, that when the Name of a disease is condescended upon in any Decisions, it is not by the Pursuer, but by the Defender, who condescends upon the same, for clearing either that the disease was not Mortal, or that it did not effect the Brains. But yet when we consider these decisions, we will find, that if the Person had been proven to have been once sick, the Dispostion is still reduced, though the disease be not proven to be such as could affect the Brain. Thus a Dispostion was reduced, albeit it was offered to be proven, that the Disponer was *mentis compos*, *February*, 1622. *Robertson* against *Fleeming*; and that he did his affairs, and sat at Table as at other times: nor is it requisit the disease be *morbus sonticus*, *pen. July*, 1635. and 7. *July*, 1629. The alledgeance of *judicij minime vaccillantis* was also repell'd, and a provision was not sustain'd made to a Child, though the Father had only a Palsie in his side, and liv'd 28. Months, *July*, 1627. And this is most reasonable, because the soundness of the Judgment being that which is not subjected to the Senses of Witnesses, they cannot properly cognosce thereupon, and they would in that case be rather Judges, then Witnesses. For if it were otherwise, Servants who are the only ordinar Witnesses that are present, would have it left arbitrary to them, to make the Disposition valid or not, as they thought fit, and they might depone very boldly, because without hazard, since in such guessings as these, they might assume to themselves a very great liberty; and thus though the Law thought it fit, not to put it in the power of the Heretor, to prejudge his Heir upon Death-bed, by Dispositions, your Lordships should by your decision, put it in the power of Servants to

prejudice

prejudge them, by their depoſitions. And if it were neceſſar to prove, that their Judgment was diſordered by the ſickneſs, then this Law had been abſolutely unneceſſar, for whatever Diſpoſition is made by any perſon, whatever condition he be in as to health, yet if he be not *ſanæ mentis*, it is ſtill reduceable; and as unſoundneſs of judgement without ſickneſſe in that caſe, were ſufficient, ſo the Law hath made ſickneſſe without unſoundneſs of judgment, to be ſufficient in this. For, to the end there might be nothing arbitrary in this caſe, where the greateſt of the Subjects (ſuch as are the Nobility) are concerned in their greateſt intereſt, which is the diſpoſition of their old Heretage; The Law hath appointed, that if the perſon be once ſick who diſpon'd, the proving that ſickneſſe without any thing els, ſhall be ſufficient for reducing that deed, except it can be proven, that the perſon who granted the Diſpoſition went thereafter to Kirk and Mercat; to which none go, till they be intirely recovered, and fit for buſineſſe, theſe being places, wherein ſound men are ſtill preſumed to be ſerious, becauſe theſe places are not fit for recreation, and ſo not fit for ſuch as are ſick, and which are acts that falls under ſenſe, and ſo may be deponed upon by Witneſſes, and are acts expoſed to the view of very many: and the Heir cannot be thereby prejudged, by either the want of Witneſſes, or by being tyed to the depoſition of domeſtick, packed Witneſſes; for ſuch only are uſually admitted to viſit the Defunct (and ſo are only the perſons who can be Witneſſes) by theſe, who had him ſo much in their power, as to elicite ſuch Diſpoſitions from him.

The Defender (my Lord) finding her ſelf ſtraitned by this debate, joyns, to her former Defence, another, which is, that going to *Kirk and Mercat* are not abſolutely neceſſar qualifications of health, but it is ſufficient if the Defunct might have gone to either of theſe, or did equivalent deeds, whereby it might have been known that he had recovered his health,

for that is the ſcope and deſign why the others are condeſcended upon; and it were unreaſonable, that the going down a ſtair within Burgh, and the buying of an Apple at a Crame, ſhould be a greater ſign of health, then the riding of a Journey: ſo that going to *Kirk and Mercat* may be ſupplyed by equivalent acts; And the Lord *Coupar* did equivalent acts, for evidencing that he was in health, at, and after the granting of the Diſpoſition, in ſo far as he roſe from, and did go to his Bed at his ordinar times, did come to Table, entertain Strangers, wait upon them without doors to their Horſes, ſell his Corns, take in his Accounts, and writ long Letters all with his own Hand; in which Letters, he ſhew a former deſign he had to make that Diſpoſition. Likeas, former Letters can be produced long prior to his ſickneſſe, wherein he ſhew'd his deſign; whereas your Lordſhips have by former deciſions found, that equipolent acts were ſufficient, as in the caſe betwixt *Sym* and *Grahame*, in *anno*, 1647. Wherein it was found, that the writing of the Diſpoſition of a ſheet and a half of Paper, all with the Diſponers own hand, was ſufficient to ſuſtain the ſame, and to defend againſt the reaſon of Reduction upon death-bed: and in *February*, 1668. in the action *Pargillis* againſt *Pargillis*, it was found, that the riding on Horſe-back, though the Diſponer was proven to be ſick, and that he was ſupported upon his Horſe, were ſufficient qualifications of health; And if the going to Kirk and Mercat were ſtill requiſit, the Lieges could never be *in tuto* when a Diſpoſition is made to them, ſeing very many men, who are in perfect health, do oft die ſuddenly, before they have occaſion to go to Kirk and Mercat, and when the perſons to whom the Diſpoſitions are made, cannot ſuſpect there is any need of their going there.

But though Kirk and Mercat were requiſit, yet it can be proven that the Lord *Coupar* went to both; and albeit he was ſupported, yet that was only in a piece of the way, which was rough, and at which he uſed to be ſupported at other times, when

when he was in health, and was therein ſupported now, not becauſe of the ſickneſſe, but becauſe of the way.

To which it is replyed, 1. That the Law and continual deciſions having fixt upon Kirk and Mercat, as *indicia Sanitatis*, no other acts can be ſuſtain'd as equivalent; for, where the Law requires ſolemnities, ſuch as theſe are, *ſolennia non poſſunt per æquipolentia adimplere*; thus earth and ſtone being required as ſymbolls in Saſines, three oyeſſes at Mercat-croces, *&c.* Acts equipolent to theſe would not be ſuſtain'd; and the Law having appointed that a Child ſhould be heard cry, to the end Marriage may not be diſſolved, though the woman die within year and day, the Law ſuſtains not that the Child was a lively Child, or might have cryed; for, ſaith that Law, It was fit that ſome certain ſign ſhould be fix'd upon, to prevent the arbitrarineſſe of Witneſſes: And ſeeing it would not be ſuſtain'd to elide the reply of *Kirk and Mercat*, and the alledgeance of health founded thereupon, that the Defunct was not in health, though he went not to Kirk and Mercat; ſo the reaſon of Reduction founded upon ſickneſſe, becauſe he went to Kirk and Mercat, ought not to be elided, by alledging that the Defender was in health, though he went not to Kirk or Mercat; and if equivalent acts were ſuſtain'd, this Law might be eaſily eluded, and the effect of it would become altogether arbitrary. 2. The acts condeſcended on, are not equivalent ſignes of health, to the going to Kirk and Mercat; 1. Becauſe theſe acts of going to Kirk and Mercat, are fixt upon by a long tract of deciſions, and ſo are *ſolennia jure recepta*; but theſe other acts are not ſuch as have been found equivalent by any former deciſion: but on the contrar, acts of more adjuſted equipolency then theſe, have been repelled, when propon'd to take off the reaſon of Death-bed; and thus in the foreſaid deciſion, *February*, 1. 1622. It was alledg'd that the Diſponer was able to go to Kirk and Mercat, and that he went about his

affaires within doors, and came to his own Table, as formerly. And though it was alledg'd upon the *penult. June*, 1635. that the granter of that Diſpoſition then quarrel'd, and which was made upon moſt deliberat grounds, was able to mannage his own affaires as formerly, having only a palſie in one arm, which did not affect the judgement. And the 1. *July*, 1637. It was alledg'd, that the Diſponer who had granted a Bond of proviſion to his own Son, had no diſeaſe which could be *impedimentum rebus agendis*, and that he lived 28. Months thereafter, and went about his affairs, yet all theſe condeſcenſions upon health were repelled, though the time of ſurviving were much longer there then here, the caſe of the granting of the Diſpoſition much more favourable (and indeed, none can be leſſe then this Defenders caſe) and the perſons who did diſpone, of a much greater conſiſtency both of health and ſpirit, then the Lord *Couper*, who was known to have needed little ſickneſſe, and much leſſe importunity and deſign, was uſed in this caſe, to make him do acts both irregular, and unwarrantable.

As to the deciſion, *Sym* againſt *Grahame*, It is anſwered, that it was proven there, that the Defunct went upon his own feet to the Apothecaries Shop, and to his Phyſitians Houſe, which implyes neceſſarily in *Edinburgh*, a going thorow the Mercat, whereby the Law is ſatisfied, and a publick act was done, which might be proven by unſuſpect Witneſſes. And as to *Pargillis* caſe, the Diſpoſition there, was made in favours of a Grand-child, with whoſe Mother the Grand-father had promis'd the Eſtate at the contracting of the Marriage, he having been Party-contracter for her, though that promiſe was not inſert in the Contract; likeas, the Diſponer went to the ground of the Lands unſupported, and gave the Saſine himſelf: and albeit he rode to the Mercat, becauſe he was Goutiſh, which is the only diſeaſe that was proven, and

which

which is in the opinion of the Phyſitians, rather a Pain, then a Diſeaſe; yet he went to the Mercat unſupported from his Lodging.

3. All theſe acts condeſcended on were done at ſeveral times, and might have been very eaſily done ſingly, by a perſon who was ſick, and none of them are ſuch acts as require health both of body and mind, as doth the going to Kirk or Mercat, nor did they require the coming abroad to open air, which is the ſevere tryal of health; and all theſe acts were tranſacted *intra privatos parietes*, and ſo ſubject to ſuggeſtion, and colluſion, the Witneſſes being ſuch as were under the power of the Defender, who did elicit the Diſpoſition, and the appearand Heir being abſent, and very remote, as is ordinar in ſuch caſes: whereas the going to Kirk and Mercat, are acts wherein the appearand Heir may hear a conjunct probation, and wherein though the Witneſſes to be led for the Defender, deſign to prevaricat, yet the fear of being controll'd by a multitude, would hinder them to adventure upon the deponing an untruth.

4. All the acts condeſcended on ſeem to be done *ex affectata diligentia, & affectata diligentia pro negligentia habetur*, nor can any acts be eſteemed equivalent, except they were ſuch, as clearly evidence, that if he had deſign'd to have gone to Kirk and Mercat, he could have done the ſame; whereas in this caſe, when the Defunct deſign'd to go to Kirk or Mercat unſupported, as Law requires, he could not perform the ſame, but behoved to be ſupported as ſaid is, by which it clearly appeares, he did not any acts that were equipolent.

To his actual going abroad to the Kirk or Mercat, I make no anſwer, ſince our Law requires his going unſupported, which cannot be alledged in this caſe; for as going to Kirk and Mercat, is an exception which takes off the reaſon of Death-bed, ſo the being ſupported elides the exception of going to Kirk and Mercat,

Mercat. And ſo unfavourable have their Reductions alwayes been in our Law, that the Purſuer offering to prove ſupported, is preferred to the Defender, who offers to prove unſupportable, as was found, 27. *July*, 1629. albeit *regulariter* the Defender is preferred to prove his own defence; nor needs the Purſuer debate from what cauſe the ſupportation proceeded, for it cannot be known to Witneſſes upon what account he was ſupported, and that might have proceeded from infirmity, as well as from the ruggedneſſe of the way: and ſo this Law would in its execution and application, return ſtill to be arbitrary, if Witneſſes or Judges might gueſs at the occaſion of the ſupportation. But without debate, the Purſuer contends that this priviledge of eliding a Reduction *ex capite lecti*, being only competent to the going to Kirk and Mercat unſupported; he who is ſupported, gains not the priviledge, becauſe he fulfills not all the qualities, and it is very well known, that the way is ordinary Calſay, and that the Houſe and Mercat are not diſtant three pair, and the Lord *Coupar* uſed ordinarily to walk there unſupported; So that when he took ſupport, eſpecially at a time when he deſigned ſo much to go unſupported, it ſhewes convincingly, that his infirmity, though not himſelf, remained ſtill diſobedient to all their deſignes, and though they could force him to diſpone, yet they could not force him to be ſound; and your Lordſhips may eaſily judge, that theſe who were at ſo much pains to make this Diſpoſition ſubſiſt, were not wanting to uſe all indeavours for carrying him over this laſt difficulty, ſo that this ſupport proceeded not from chance, but from neceſſity.

Seing then your Lordſhips have been ſo rigid obſervers of the Law, in prejudice of poor Children, and poor Relicts, who were unprovided, I hope you will not proſtitute it in favours of a ſtranger who had formerly gotten all the Defuncts

Eſtate

Eſtate in Jointure: Reward not thus the importunity of Wives, and bryb not avaritious perſons to trouble us at a time, when we ſhall think all time too ſhort, to be imployed in the ſervice of Him, whom we have ſo much, and ſo often offended; And take not from us in one deciſion, the protection of the Law, when our judgments are frail, the quiet of our Souls when we are ſick, and the love of our Succeſſors when we are dead.

The Lords reduc'd the Diſpoſition.

For

For the Counteſſe of *Forth*, &c. againſt *E. C.*

EIGHTH PLEADING.

How far reſtitutions by way of Juſtice, are prejudged by Acts of Indempnity.

I Might ſtand in the next degree of guilt, to thoſe who forfeited the Earl of *Bramford*, if I thought that his Merit, or your Lordſhips Loyalty needed, that I ſhould urge much the favour of his caſe: He was a perſon who carried the honour of our Nation, as far and as high as could be expected, from the happieſt Subject in much better times: for after that his Merit, arm'd meerly by his own Valour, had raiſ'd him to be a General in *Sweden*, he was choſen General in *England*, in a War, wherein all his Nation were ſuſpected, and did there, actions worthy of our Praiſe, and their Wonder. But whilſt he had refuſ'd to draw a Sword againſt his Country-men, even whilſt they were Rebels, they forfeited him, for fighting in a Kingdom, over which they had no juriſdiction, and forfeited him by His *Majeſties* Lawes, and at the purſute of His *Majeſties* Advocat, when he was hazarding his life for His *Majeſty*, by His own command, and in His own preſence; and the very day after he had gain'd that Battel for Him, which if proſecuted according to that brave Generals advice,

advice might have ſecured to Him, that juſt power, which thoſe Rebels were ſcruing out of His hands. The Earl of *Forth* being with His *Majeſty*, reſtor'd to his own, his Lady and Daughter purſue ſuch as intrometted with his Eſtate, and inſiſt now againſt E. *C.* who for being General to the then Eſtates, got 40000 pounds out of the Eſtate of the Earl of *Forth*, which was a part of that Sum, which was due to his Lordſhip upon an heritable ſecurity, by the Earl of *Errol* and his Cautioners. In which Debate, if I uſe terms which may ſeem indiſcreet and zealous, I muſt be paroned, ſince I ſhall uſe none but what are forc'd upon me by that Act of Parliament by which I plead, ſince E. *C.* is a perſon to whom I wiſh much ſucceſs in every thing, ſave this Debat, and to whom my reſpects are above jealouſie.

It is alledged for E. *C.* that though ſuch as are reſtored againſt forfeitures, by way of juſtice, may by vertue of their reſtitution, repeat all that is extant of their Eſtate, yet they cannot repeat what money belonged to them; for money being *res fungibilis*, and naturally ſubject to conſumption, it paſſeth from hand to hand, without bearing any *impreſſa*, whereby ſuch as intromet with it, may know how it came, and whoſe it was: Nor doth the nullity of a Title in the firſt obtainer, infer repetition of money from ſuch as derive a right from them, as may be clear'd in many inſtances, for if money had been payed to one, who obtain'd an unjuſt ſentence from the late Uſurpers, yet they would not be liable in repetition, after that ſentence were revived and declared null.

If one ſhould ſerve himſelf Heir unjuſtly, and as Heir aſſign a Sum to one of his Debitors, though his ſervice were thereafter reduc'd, as unjuſt, yet could not his Aſſignay be oblieged to reſtore what he recovered by vertue of that Aſſignation. If the Exchequer ſhould preſently giſt an Eſcheat, though the Eſcheat, and Horning whereupon it proceeded, were thereafter reduc'd, yet a ſum payed by vertue of that Giſt, when ſtanding, could not be

repeated, and if this Principle were not ſuſtain'd, all Commerce would be deſtroyed; and though *E. C.* his Title be now reduc'd, yet it was valid the time of his intromiſſion, which is ſufficient to aſtruct his *bona fides:* and Lawyers, even in intromiſſions with money, which was at firſt robbed, conſider only *Vim illam quæ intervenit tempore numerationis*; whereas here, though the Eſtates did moſt unwarrantably and rapinouſly forfeit the Earl of *Forth*, yet his money being brought in to the publick Treaſure, and confounded with their Caſh, it ceas'd to be his, and became theirs; and therefore, *E. C.* being Creditor to them, as he might have taken any Precept juſtly from them, payable out of their Treaſure, So might he have taken Precepts upon his Eſtate, which ceas'd to be his: Nor can the Earl of *Forth* be ſaid to be a loſer by *E. C.* ſeing the Eſtates for the time would have brought it in, and converted it to their own uſe, in which caſe, *Forth* would not have got repetition againſt the perſons to whom it were payed.

To theſe grounds, it is (my Lords) replyed for the Earl of *Forth*, that there is a difference ſtated in Law, betwixt reſtitutions by way of Grace, and reſtitutions by way of Juſtice; in reſtitutions by way of Grace, the guilt remains though the puniſhment be remitted, and the perſon forfeited is reſtored, not to his Innocence, but to his Eſtate, and therefore he recovers only what is extant of his Eſtate. But in reſtitutions by way of Juſtice, the Sentence forfeiting is declar'd never to have been a Sentence, and therefore, it can never be ſuſtain'd as a Warrand to any effect, *Sed comparatur juri poſtliminii & fingitur nunquam interveniſſe, & tantum reſtituit juſtitia quantum abſtulit injuſtitia*; And therefore, not only what is extant, but all that belonged to them there is reſtored. But Sentences forfeiting may be diſtinguiſhed furder, (as *Boſsius* obſerves, *tit. de remed. Juſtitiæ*) into ſuch, as though they were injuſt, yet every privat perſon was not oblieged to know the injuſtice of the forfeiture;

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as if a man had been forfeited in a Juſtice-court for murder under truſt, or a Landed-man for theft; againſt which ſentences, though the perſon forfeited were reſtored, yet it might ſeem hard, that ſuch as intrometted by vertue of Warrands or Aſſignations from the Eſtate, ſhould be forc'd to reſtore all they received; but others may be forfeited, as the Earl of *Forth* was, by vertue of Sentences, which were no ſooner pronounced, then they became Treaſon, by an execrable inverſion, not in the Pannel, but in the Pronouncers, and were not only Treaſon of their own nature, but behoved to be acknowledged treaſonable by all ſuch as heard of them, and ſuch ſure was that Sentence pronounc'd againſt the Earl of *Forth*; which was againſt the fundamental Laws of this and all Nations, and which is declared by the Act of Parliament reſtoring him, to have been, at the time it was pronounc'd, an Act of Rebellion, and an invaſion upon his Majeſties Royal Prerogative.

This being the ſtate of this reſtitution, It is, my Lords, anſwer'd to the Defence, that it is defective in the aplication of all its parts; For, that this money was not *res fungibilis*, appears, becauſe the Law diſtinguiſhes all Eſtates *in mobilia (quæ ſunt fungibilia) immobilia, & nomina debitorum. Nomina debitorum* are Bonds due to the Creditor, which are of a middle nature, betwixt movables and immovables, and theſe fall certainly under reſtitution by way of Juſtice, even according to the Defenders own Principles, for they bear the name and *impreſſa* of him to whom they belong, and ſo the Intrometter is warned to bewar of them: and that this money crav'd here to be repeated was ſuch, is very clear, for it was due upon an heretable Bond to the Earl of *Forth*, by the Earl of *Errol* and his Cautioners, and came never in, nor was confounded with the Publick Treaſure; for *E. C.* got a Precept upon it, before the Publick obtain'd a Sentence for it, and got a Warrand for that ſpecifick ſum owing by that Bond to the Earl of *Forth*, and got payment of it from the Earl of *Forths* Debitors, as

Debitors to him: ſo far did juſt Heaven allow this haſt to be its own puniſhment.

As to the ſecond member of the Defence, which is founded upon his *bona fides*, to intromet with the ſum for payment of a Debt due to him, (he having been General at that time) from an Authority then in being; It is reply'd, that *Bona fides* in the Intrometter, doth not extinguiſh and take away the Right of the true Proprietar, *nam quod meum eſt, ſine facto meo à me auferri nequit.* And Lawyers determine, that to denude a man of his Property, there muſt be ſome fact of his, either *ſe obligando*, or *delinquendo*, neither of which can be alledged in this caſe; and if the Earl of *Forth* was never denuded, then *Calendar* could have no Right; for, *duo non poſſunt eſſe domini in ſolidum unius & ejuſdem rei*, which maxim holds ſtill *in ſpecibus & nominibus debitorum*, for though ſometimes it may fail in numerat money, the dominion whereof is, for the good of Commerce, ſometimes tranſmitted by ſimple numeration; yet it never fails *in ſpecibus, ſeu corporibus*: and that money due by Bond, is not of the nature of *pecunia numerata*, is clear from *l. ſi certus ff. de legat.* 1. And if a Robber take away my Cloak, and give it to a Stranger, yet I would *per rei vindicationem* get it back, notwithſtanding of the Defenders *bona fides*; but here there was no *bona fides*, ſeing *E. C.* was oblieg'd to know, that the Earl of *Forth* was injuſtly forfeited, and that the Act of Parliament, againſt which there is no diſputing, has declar'd it to have been Treaſon; and if *E. C.* were purſued for oppoſing His Majeſty at that time, or for concurring to the forfeiting of the Earl of *Forth*, he could not defend himſelf otherwayes, then by the Act of Indempnity: *Ergo*, in the caſe of reſtitution of *Forths* Eſtate, which is excepted from the Act of Indempnity, That Warrand proceeding upon forfeiture, cannot defend him; for how is it imaginable, that his *bona fides*, which could not defend him againſt the loſſe of his own Eſtate, ſhall be able to defend

ſend him againſt the reſtoring of *Forths*, to which he had *aliunde* no Right? There is no *bona fides*, but where it is founded upon a Title, *Et ubi non ſubeſt Titulus, ibi non eſt admittenda bona fides*; But ſo it is, that *E. C.* his Title, *viz. The forfeiture of the Earl of* Forth, is declar'd by Parliament, never to have been a Title: But *E. C.* who was a Member of that Parliament which forfeited the Earl of *Forth*, and General of that Army which defended them, is in the ſame caſe, as if two Robbers had taken a Bond from a free Liege, and had given it to one of their own Society, who was at leaſt a ſpectator; in which it is moſt certain, that the free Liege ſo robbed, would recover payment from him who intrometted.

By this unwarrantable intromiſſion with the Earl of *Forths* money, *E. C.* became his Debitor, and the ſupervenient Act of Indempnity could no more defend *E. C.* againſt this, then it could againſt his other Debts. Indempnities are deſign'd to ſecure againſt the Princes Purſutes, who gave them, but not to ruine Innocents, elſe were theſe Indempnities, Acts of Injuſtice, not of Clemency. *Si criminaliter captum judicium interventu indulgentiæ ſcriptum eſt, habet tamen reſſamen indagationem, & petes de fide Scripturæ civiliter quæri*, l. 9. C. ad L. Cornel. de falſ. Amneſties are but general Remiſſions, and ſo cannot be ſtronger as to all crimes, then a particular Remiſſion is as to one: But ſo it is, that a particular Remiſſion can only diſpenſe with the Princes Intereſt; nor doth it cut off the Purſutes of privat perſons, as the former Law obſerves very well; and the Emperor in another Law tells us, *Nec in cujuſquam injuriam beneficia tribuere moris noſtri eſt*, l. 4. c. de emancip. libero.

From theſe grounds, your Lordſhips have an eaſie and juſt proſpect of the anſwers which may be made to the inſtances adduced; for we are not in the caſe of ſuch as obtain Gifts from the preſent Exchequer, nor Rights from Heirs once lawfully ſerv'd: for the juriſdiction whereby theſe Rights are eſtabliſh'd,

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are not *funditus* taken away, nor were the ſingular Succeſſors oblieged to know the Sentences, whereupon their Rights were founded, to have been null, as *E. C.* was in this caſe; nor can this prejudge Commerce, except among ſuch as are oblieged to know the grounds of their Commerce to have been unwarrantable, and Rapines and Violence *ſunt extra Commercium*, which is ſo far from being an abſurdity, that it is an advantage; for this may help to ſtop all Commerce amongſt Rebels and Uſurpers, and to looſe theſe cords by which they are tyed: and from this, I beg leave to repreſent to your Lordſhips, that by this deciſion you will do more to hinder Rebellion, and to encourage Loyalty, then Armies can do; for ſince no man will hazard hanging and damnation by Rebellion, without he be baited to it, by the certain expectation of a Prey; So, if Rebels find, that they can never be ſecure of any Prey ſo obtain'd, they will certainly neither be ſo eager to have ſuch as are Loyal forfeited, nor ſo deſirous to ſettle upon themſelves, Eſtates ſo rob'd.

As to that principle, that whatever defect was in the Title here, yet there was none in the numeration of the money, and defects in the numeration are only objected againſt ſingular Succeſſors; It is anſwered, that *vis eſt vitium reale, & afficit rem ipſam licet tranſierit per mille manus.* And this original ſin infects the whole iſſue, for the States could not tranſmit a better Right then they had themſelves, *nemo poteſt tribueri alteri plus juris, quam ipſe in ſe habet:* and *Plin. lib. 3. epiſt. 9.* informs us, that *Cæcilius Claſſicus* having robb'd the Province which he commanded, and having payed his Creditors with the ſums extorted, *pecuniæ quas creditoribus ſolverat, ſunt revocatæ.* But though this might be alledged where there remains ſtill ſome colourable Title in the Author, and where the ſingular ſucceſſour was not oblieged to know the defect, yet in this caſe it can never be pretended by *E. C.* whoſe Right is *funditus* taken away, and who was at the time the mony was aſſign'd, or was numerat

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to him, oblieged to know that defect in his Right, which is now the ground of this reſtitution.

I ſhall not trouble your Lordſhips, with anſwering thoſe objections, founded upon the Earl of *Forths* ratifying and homologating his own forfeiture, by giving in a Petition, 1647. when he was content to accept back his Heretage, without theſe ſums; for it is known, that Petition was not ſign'd by himſelf, nor did he ever appear before thoſe Uſurpers; and what was done by his friends, cannot bind him, eſpecially whilſt that Uſurpation continu'd, under which he firſt ſuffered; nor to the Act, 1662. wherein ſome Intrometters are declared free, for that Act was only conditional, and upon proviſion that His Majeſty ſhould pay the Earl of *Forths* Succeſſors 15000 Pounds Sterling, out of the Fines, which condition was never purified, and I wiſh it had, for that was much better then what is here expected: theſe grounds are ſuch, upon which none but ſuch as are ready to drown would faſten: But, my Lords, if I needed to prepoſſeſſe you with what the Parliament deſigned in this reſtitution, I might eaſily clear, that they deſign'd theſe Intrometters ſhould be lyable; for when Duke *Hamiltoun* and the Earl of *Errol* were abſolv'd as the immediat Debitors, it is very well known, that they were abſolv'd upon expreſſe Proviſion, that they ſhould deliver to the Earl of *Forths* Succeſſors, ſuch Papers as might prove the intromiſſion of theſe Defenders, which had been unneceſſar if the Intrometters had not been liable, and the reaſon why theſe Debitors were abſolved had been groundleſſe, if Intrometters had not been liable. But to what purpoſe ſhould the Parliament have reſtor'd *Forth*, if they had not deſign'd the Intrometters ſhould be liable? For the Parliament knew, that there was nothing elſe, which could have been reach'd by this reſtitution, except theſe moneys now purſued for, and ſo their Juſtice had proved an airy and empty *Fanfara*, bringing nothing with it but the occaſion of certain ſpending, upon an uncertain expectation:

pectation: to avoid all which debate, the Parliament have expreſly ordain'd the firſt Debitors to produce theſe Papers, for proving againſt theſe Intrometters, who are hereby declared lyable; which words are ſo expreſſe, that they preclude all cavil, as well as difficulty.

This being the nature of our Purſute, and theſe the anſwers to any pretended difficulties, It is humbly recommended to your Lordſhips, to give a teſtimony of your hatred againſt thoſe violent courſes formerly practiſed, and to teach Poſterity what ſuch invaſions may expect. I know well, that no man has deſerv'd better of His Majeſty, then *E. C.* hath of late; and I hope, that when you have decided againſt him, he will heartily acquieſce to your Sentence, as a ſurder proof of his ſincere Loyalty, *Nec tollitur peccatum, niſi reſtituatur oblatum.* I confeſſe, that he did not yield to thoſe impreſſions, till they had overcome the whole Nation, and that nothing but the perſwaſion of his being then employed in the ſervice of his Conſcience and Countrey, could have with-drawn him from the ſervice of his Prince: But this can plead no further, then that his Prince ſhould pardon theſe eſcapes, not that he ſhould reward them, eſpecially to the prejudice of His faithful Friends.

The Lords ſuſtain'd the Purſute, and repell'd the Defences.

For

A Debate in favours of the Earl of *Forth*, againſt *E. C.*

NINTH PLEADING.

How far a perſon unjuſtly forfeited and reſtored, may repeat Annual-rents from the Intrometters.

IF I were not (my Lord *Chancellor*) very confident of the Juſtice of my own Cauſe, and of your Lordſhips Learning, as well as Integrity; I ſhould be ſomewhat jealous, that the learn'd diſcourſe you have heard, in favours of my L. *C.* might leave ſome impreſſion. But, my Lord, I think it impoſſible that any, beſide thoſe unjuſt Judges who forfeited the Earl of *Forth* of his principal Sum, would again forfeit him of his Annual-rents; nor do I imagine, that even thoſe would have done it, if they had not been diſtemper'd by their own feaveriſh zeal, and that national fury: ſo that if your Lordſhips ſhould follow their example, you ſhould ſhare their guilt, but want their excuſe.

It is (my Lord) now alledg'd, that *E. C.* is not liable in payment of Annual-rent to the Earl of *Forths* Succeſſours, becauſe Money is of its own nature *res ſterilis*, and in Law bears not naturally Annual-rent; and therefore an Intromertor, though *predo*, though *malæ fidei poſſeſſor*, is not liable for Annual-rent, for no man is oblieged to improve another mans Money: and by the civil Law, (which was more ready to give Annual-rents then ours) *In corporibus ex quibus fructus*

naturaliter proveniebant malæ fidei poſſeſſor, was liable *in fructus productos*, but *in corporibus quæ non producebant fructus de ſua natura, nec predo, nec latro tenebatur in fructus*; and though a perſon who impropriated publick Money was puniſhable, *ratione repetundarum vel ex reſiduis*, and ſo was there moſt unfavorable, of all Intrometters, yet he was not liable *in uſuras*; nor by our Law are Annual-rents ever due, *ſed ex lege, vel ex pacto*, neither of which can be alledged in our caſe; and the Act of Indempnity hath made Intrometters with publick Money liable in repetition, and though their intromiſſion be moſt unwarrantable, yet are they not made liable by that Act in Annual-rents. Likeas, though theſe Moneys due to the Earl of *Forth*, did at firſt bear Annual-rent, yet they being once uplifted, became a ſum lying in Caſh, which *E. C.* was not oblieg'd to re-imploy upon Annual-rents, and by the Act, 1662. whereby His Majeſty was to repay the Earl of *Forth*, he was only to be repayed of his principal ſum, but not of his Annual-rent.

To which, (my Lord) it is anſwered for the Earl of *Forth*, That ſince your Lordſhips have found *E. C.* his Title to have been unjuſt, we muſt debate now againſt him *tanquam*, at leaſt, *male fidei poſſeſſorem*; for the Act of Parliament has declared this forfeiture an invaſion upon His Majeſties Prerogative, and you have by your Sentence, found it not to be ſhelter'd under the Act of Indempnity.

Let us therefore, in the firſt place, conſider that the Law never deſign'd to favour oppreſſors, nor ſuffer the innocent to be prejudged; it never deſign'd that men ſhould enrich themſelves by their guilt, and be rewarded for their violence. And ſince the fear of puniſhment is ſcarcely able to reſtrain that wickedneſs, to which we are naturally prone; it were abſurd to highten our vitiouſneſſe by rewards; whereas, if *malæ fidei poſſeſſores* ſhould not be lyable to repay Annual-rents, they ſhould be enrich'd by their oppreſſion, and ſhould be baited to commit violence, and to maintain themſelves in it; for they

ſhould

ſhould be ſure *lucrari* (at leaſt) *uſuras rei, per vim & injuſte ademptæ.* And therefore, my Lords, though the Law makes a diſtinction *Etiam in malæ fidei poſſeſſore, inter corpora, ex quibus fructus naturaliter proveniunt, & corpora ſterilia:* yet, they do not this upon deſign to favour vitious or violent Intrometters, but in order to the ſeveral wayes of taxing the reſtoration of the perſon injured; for, where the Bodies unjuſtly intromet-ed with bear fruits, they ordain the fruits to be reſtor'd, but where they bear not naturally fruits, the Law doth not ordain the Intrometters to be free, but to be lyable *in damnum & intereſſe, & in omnem cauſam*; this the Law defines to be all the advantage could have ariſen out of the thing intrometted with: this being an uncontraverted principle, I humbly conceive, *E. C.* ſhould be lyable to theſe Annual-rents acclaimed, and that upon theſe three conſiderations.

Firſt, This Sum intrometted with by *E. C.* was a ſum bearing Annual-rent; and therefore, *Forth* being reſtored by way of Juſtice, he ought to be put in the ſame caſe he was in before the forfeiture: and if the money were now lying unuplifted, *Forth* would be preferred to *E. C. quoad* theſe Annual-rents, which clears, that they were never due to *E. C.* and if they were not his, he ought to reſtore them. The forfeiture is declared to be no Warrant, and ſo, though *E. C.* were in the ſame condition as a ſtranger is, who intrometts with another ſtrangers Money without a Warrant, yet ſure he would be lyable in Annual-rents, if he intrometted with a ſum bearing Annual-rent; much more then ought he to be lyable, who hath intrometted with a ſum, which was unjuſtly and predoinouſly intrometted with. For here, *E. C.* is in the ſame caſe, as if a man had broke my houſe, and had taken away my Bonds with blank Aſſignations lying beſide me, and had uplifted for many years, the Annual-rents of theſe ſums; or if a man had, upon a falſe token, taken up my moneys which bear Annual-rent; in which caſes it is moſt undenyable,

that the vitious intrometter, would be lyable in re-payment of the Annual-rents; and to invert one of the Defenders own instances, it is not imaginable, if any should uplift a sum belonging to a person lately forfeited, and which did bear Annual-rent, that the Exchequer would not exact Annual-rent from the Intrometter. I might hear urge likewayes, that a Minors money intrometted with, bears Annual-rent by the civil Law and ours; and it is most clear, that *pinguius succuritur restituto, per modum justitiæ quam minori*, as *Bossius* well observes, *tit. de remed. just. num. 3. & Jason. ad l. Gallus ff. de liber. & postlim.* for, as they are equal, in that neither did consent to the intromission, so he who is forfeited for his Countrey, deserveth more favour then a Minor doth; and many things are in Law allowed *ob bonum Rei-publicæ*, but we are not here in the case of *corpus sterile*, for money bearing Annual-rent is not *corpus ex sua natura sterile*, but *habet fructus ex se facillimè provenientis*; *usura est* Τοκος *seu partus pecuniæ*, and should rather be restor'd then *fructus prediales* ought to be, for in these the Intrometter bestow'd his industry, but here Annual rent doth grow very easily: and that Annual-rent is due, even where it was at first *sterilis*, is clear from §. *quid si l. item veniunt ff. de hared. petit. quid si post venditam hæreditatem hic ipse res venient, fructusque earum, sed si forte tales fuerunt, quæ vel steriles erant, vel tempore peritura & hæ distractæ sunt vero pretio, tunc potest petitor eligere ut sibi pretia & usuræ præstentur.* Upon which Law, the Doctors observe, that *malæ fidei possessor tenetur rem ipsam restituere, si extet, vel pretium & usuras, si non extet:* but much more, where money bearing Annual-rent is intrometted with, for there the proper *damnum & interesse* is Annual-rent, and our Law calls Annual-rent *the interest of money*; So that though the money had been *sterile*, yet the vitious Intrometter would have been lyable *in damnum & interesse*, and the damnage and interest of money is Annual-rent: nor is this money of the nature of that money, which the Law makes *ste-*

rilis,

rilis, for here was an heretable Bond bearing Annual-rent, *nomen debitoris*, and which in our Law is not accounted *inter mobilia*, and such a Bond *pro feudo habetur*; nor can it be ever said, that this heretable Security was lawfully looſed, no requiſition having ever been made.

Another ground I go upon is, That *malæ fidei poſſeſſor, tenetur non ſolum in fructus perceptos, ſed in percipiendos*, l. ſed & partus ff. quod metus cauſa; Where the Law determines, that when any thing is *vi, vel metu* taken, *partus ancillarum & fetus pecorum, & fructus reſtitui, & omnem cauſam opportet; nec ſolum eos qui percepti ſunt, verum ſi plus ego percipere potui & per metum impeditus ſum hoc quoque præſtabit.* And when Lawyers conſider *fructus illos percipiendos qui ſunt reſtituendi à malæ fidei poſſeſſore*, which they call *fructus civiles*, they define them with *Bartolus, ad l. ex diverſo ff. de rei vindicat.* to be *vel quos petitor percepiſſet, ſi ei poſſidere licuiſſet, vel quos poſſeſſor quo alius diligentior non eſt, percipere potuiſſet.* According to which Characters (worthy of their wonderful Author) theſe Annual-rents are to be reſtored upon both accounts; for they might have been uplifted by the Earl of *Forth*, if this forfeiture and intromiſſion had not interveen'd, and by *E. C.* had he continued theſe Sums for after-years, as in the beginning, in the Cautioners hands, or if he had re-imployed them in other hands upon the firſt termes; and if he, ſtudying either his own gain or convenience, has inverted the primitive uſe of *Forths* money, ſhould either his gain or humour prejudge *Forth? Incuria ſua in rebus alienis nocere non debet.* And *Copus Pariſienſis* doth excellently obſerve, that *Sicut ille qui culpa deſit poſſidere pro poſſeſſore habetur, ita & ille qui fructus percipere potuit pro percipiente habetur, Si culpa ſua deſitit non poſſidere*, what can be more ſolid, or plain, though *E. C.* had not employed them upon Land, whereof he has reaped the fruits conſtantly, ſince they were ſo imployed? If a man be violently ejected out of a Miln which was grinding, a Coal-heugh, or Salt pan which

was

was going, he would certainly be reſtored, not only to his Coalheughs or Salt-pan, but to all that they might have yielded; much more then ought he to be reſtored to his Annual-rent, which was a more ſure product then theſe. And whereas it is pretended, that an Intrometter, though wanting a juſt Title, is not oblieged to improve the money ſo intrometted with by him, and ſo cannot be lyable to pay Annual-rents for it; It is to this anſwered, that though he be not oblieged to improve them, yet he ſhould be lyable, if he altered the natural improvement of them: this would not be allowable in *bonæ fidei poſſeſſore*, much leſſe ought it to be indulged in *malæ fidei poſſeſſore*; and though the Intrometter *in crimine repetundarum*, be not lyable *in uſuras*, yet he is lyable *in quadruplum*, which much exceeds theſe, and would alſo be lyable *in uſuras*, if he intrometted with publick money bearing Annual-rent, which is our caſe. And whereas it is pretended, that Annual-rent is in our Law only due, *ex Lege, aut ex Pacto*; It is anſwered, that Annual-rent is here due, *& ex Lege, & ex pacto*; *ex Lege*, becauſe in reſtitutions *ex Juſtitia*, the party ought to be reſtored *in integrum, cum omni cauſa*, in which Annual-rent is included: *& ex Pacto*, becauſe *C.* hath given his Bond to ſecure the Debitors, as to all damnage or intereſt they could ſuſtain.

The third Principle I fix upon is, That *E. C.* gave his Bond to relieve the Earl of *Kinnoul* and *Errols* Cautioners, of all damnage and intereſt they could ſuſtain by paying theſe moneys to him; and therefore, ſeing they are now abſolved by the Parliament, upon expreſs proviſion, that they ſhould make out the intromiſſion of ſuch to whom they payed the money; it follows by an infallible inference, that they are lyable to the Earl of *Forth* for what damnage he ſuſtain'd, and he by this Sentence, is ſurrogat in their vice; and *E. C.* having given this Bond, ſhould have alwayes lookt upon this money, as that which he was moe wayes then one tyed to improve, and ſhould have known, that this Talent was not to have been laid up.

I will

I will not burden your Lordſhips, with ſatisfying the clamours rais'd againſt the rigidity of this Purſute. It is not craved, that the King would beſtow *E. C.* his Eſtate upon *Forth*, but that *Forth* ſhould be reſtored to his own, *E. C.* his Life and Fortune being at His Majeſties diſpoſal, as excepted from the Act of Indempnity: The Ranſom craved, is only to reſtore the Earl of *Forths* Eſtate. We deſire not *E. C.* ſhould be made poor by his crime, and it were unwarrantable to deſire that he ſhould be enriched by it, eſpecially when his being enrich'd will neceſſarily ſtarve them, who had never any requital for their Loyalty, ſave this Act of Juſtice. *Forths* Lady and Family have been forced to borrow money at dear rates (as all ſtarving people do) to ſupply their want of theſe Annual-rents, and if they be not reſtor'd to theſe, they are ſtill to be Beggars, for the Principal will not pay their Debts; and ſo they muſt wander the indigent inſtances of their Princes unkindneſſe, and Countries injuſtice, whilſt their Oppreſſors do warmly poſſeſſe their Eſtates, as the reward of their oppoſition to His Majeſty.

Not decided in jure.

For

For *Bartholomew Parkman*, againſt Captain *Allan*.

TENTH PLEADING.

Whether Ships taken after they have carryed Contraband-goods, can be declared Prize.

MY Client is, I confeſſe, (my Lords) taken as an enemy to His Majeſty in this War, but it is by a Privateer,, who makes all rich Ships ſo; his Ship is adjudg'd Prize, but it is by the ſentence of a Judge, who having the tenth of all Ships as his ſhare, was too much intereſted to releaſe her when ſhe was taken: but our Law being jealous of that Court upon that account, has allow'd a remedy by your juſtice, againſt what injuſtice they could commit; and when we are concern'd with ſtrangers, and to let Forreigners know what Juſtice our Country diſpenſes, it was fit that they ſhould have entruſted the deciſion to your illuſtrious Bench, whoſe Sentences may convince, if not ſatisfie, even ſuch as are looſers by them.

The Sentence adjudging that Ship Prize, is by the Admiral, founded upon theſe two grounds, firſt, that His Majeſty has, by His Declaration ordain'd, that all Ships which were ſail'd by his Majeſties enemies the Hollanders, ſhould be ſeiz'd upon as Prizes, and this Ship was ſail'd by Hollanders, at leaſt three

three of them were of that Nation. The second ground was, that he carry'd Contraband-goods for supplying His Majesties enemies, *viz.* Stock-fish, and Tar; and though he was not taken with these Contraband-goods, yet he was taken with that Salt which was the return of these, having loaded in Salt as the product of these Goods. My Client has rais'd a Reduction of this Decreet, as injust, and reclaimes against it upon these reasons.

As to the first reason of Adjudication, bearing, that the Ship was sail'd with three Hollanders, he alledges that the *Swede* being an Allye, was not oblieg'd to take notice of the King of *Englands* Proclamation of War, which is indeed *Lex Belli*, *quoad* his own Subjects, and may warrand them in what they do against the Hollanders, who are declar'd enemies; but no Lawes made by him can tye Allyes, further then is consented to by expres Treaties amongst them: and it were injust, that because the King of *Britain* designs to make War with *Holland*, that therefore it shall not be free for *Swede* to use any Hollanders in their service, especially since without Hollanders, it is impossible to them to manage their Trade; and were it not injust, that all the *Swedes*, *Spainiards* or others, who had employed the Hollanders before the War to sail their Ships, and had rely'd upon their service, should be forced immediatly, upon declaring a War, to lay aside all Trade; and if it were injust for any in *Britain* to take prisoner a Hollander, who serv'd a *Swede* in *England*, much more injust it is to take their Ship and themselves as Prize, because they were serv'd at Sea by Hollanders: Nor is it advantageous for the interest of *England*, that this glosse should be put upon the Proclamation, since it is *Englands* interest, that the Hollanders should all desert their Countrey, and serve abroad amongst Strangers; whereas, by this glosse, they would be forc'd to stay at home, since none else could employ them; and this will extreamly gratifie *Holland*, who commands under severe pains, by

publick Placats, that none of their Subjects, especially Seamen, should serve abroad.

It is also humbly represented to your Lordships, that some of the three who are Hollanders are only young Boyes, who have no constant domicile, but serve where they can have employment, and Servants are, by the Laws of *Oleron* (which are now the *Lex Rhodia* of *Europe*) accounted inhabitants of that place where they serve; and we consider not *domicilium originis in servis*, for they in all senses, and amongst all Nations, follow the domicile of their Master, else the power of Masters would be much impair'd, and Commerce much entangled. Likeas, it is fully proven, that these men were not employed upon design by my Client, but were hired by him upon the death of such as serv'd him when he was in *Denmark* and *Holland*, which necessity is sufficient to defend Subjects, and much more Allies; nor is it imaginable that a *Swede*, who is not concern'd in the War, should, if his men die in *Holland* or *Denmark*, lye idle there and loss his Trade, and stay from his Countrey, because he cannot employ his *Majesties* enemies, nor would *England* allow this, if they were Allies, and the *Swedes* only concern'd in the War: and though in a former case, your Lordships adjudg'd a Ship called *the Castle of Riga*, because sail'd by Hollanders, yet the greatest part of the Sailers were Hollanders in that case, who might, because of their number, have commanded the Ship and taken her to *Holland*, or have with her fought against His Majesties Ships, and have made them Prize, when they were secure. Nor doth it follow, that because His Majesty in His Treaty with *Spain*, has allow'd the Flandrians a liberty to sail with Hollanders, that therefore it must be regularly lawfull to sail with Hollanders; for the design of that was not so much to allow the Flandrians to sail with Hollanders, as to secure them against seizures, upon the presumption of their speaking Dutch, because of the vicinity of their Language, sayes the Treaty; and if this had not been granted

granted to the Flandrians, all their ſhips might have been brought in, upon pretext that they were ſail'd with Hollanders.

The ſecond reaſon of Reduction, upon which my Client craves to reſcind that pretended Adjudication, is, that though he had carryed in Stock-fiſh and Tar to His Majeſties enemies, yet except he had been taken when he was actually carrying theſe Contraband-goods, his being taken with the return of theſe Goods was no ſufficient ground of ſeizure, which I ſhall endeavour to evince by many reaſons; Firſt, That by no Law, Stock-fiſh nor Tar can be call'd Contraband, ſeing Contraband-goods are only ſuch as are determined to be ſuch by an expreſs Treaty, or by the general cuſtom of Nations; neither are Contraband-goods ſtill the ſame everywhere, but are by private Treaties with Allyes, eſtabliſh'd to be ſuch, in reſpect of ſuch termes as are agreed upon betwixt them; and generally theſe are only counted Contraband-goods *quoad* Allyes, which have no uſe in the place to which they are carryed, but for carrying on, and maintaining the War; and ſeing the reaſon why Contraband-goods are prohibited, is only that Allies may not aſſiſt in the War againſt the Confederats, it is therefore very conſonant to reaſon, that the Law ſhould only interpret thoſe Goods to be Contraband, which ſerve properly, and immediatly for maintaining the War, and Tar cannot be call'd ſuch, ſeing it ſerves more for Peace, then War; and though an Naval War cannot be carryed on without Tar, yet Tar cannot be ſaid to be Contraband, no more then Cloath, Stuffs, Linning, or ſuch things, can be call'd Contraband, ſeing a War cannot be carry'd on without theſe: and if we look to the Treaty betwixt the Crowns of *Britain* and *Sweden*, we will find, that Tar is not enumerat in that Article, wherein it is declared what Goods can be accounted Contraband, and in ſuch ſpecial Articles as theſe, *incluſio unius eſt excluſio alterius*, eſpecially where it appears to be deſigned by both parties, that their

Subjects ſhould be inform'd, what ſhould be lookt upon as Contraband; and it was very fit that their Subjects ſhould have been inform'd expreſly, elſe that Treaty could but prove a ſnare; and if we look narrowly unto the nature of the particulars there enumerat, we will find, that there is nothing there expreſſed to be Contraband, but what is only and immediatly uſefull for the War; and there is no general in all that Article, but only *Inſtrumenta Bellica*, which cannot be extended to Tar, whithout an evident wreſting of the word.

2. Though by an expreſſe Article, the carrying in Victuals to enemies be diſcharg'd as Contraband-goods, and that under the word of *Comeatus*, yet Victual is only declared to be Contraband, in caſe it be carry'd to any of the enemies Cities when they are beſieg'd, *Si Civitas ſit obſeſſa* (ſaith *Grotius*) which reſtriction was very reaſonable, for then the carrying in that Victual was the relieving and the maintaining of an enemies Town againſt the faith of the League; for there, he who doth feed, doth defend: and though *Peſh.* relates, that the Dantzickers did confiſcat, in *anno*, 1458. ſixteen ſail of Lubeckers for carrying Victual to the enemies, yet he forgets to tell whether the enemies were beſieg'd, but he expreſly relates, that there, the carrying in Victual was expreſly prohibited. Neither was there any ſuch conſiderable quantity of theſe Stock-fiſh carryed in here, as might ſhew any deſign of aſſiſting the Hollanders by Victuals, ſeing it was carryed in a very ſmall quantity, and might have been neceſſar for the Purſuers own Company; and if they had deſign'd to have carryed theſe as Commodities, they had carry'd them in greater abundance; and Tar is the product of *Sweden*, and ſo Commerce in it is neceſſar for them.

And whereas it is contended, that the Ship had formerly carried enemies Goods, and conſequently had tranſgreſſed that Article of the Treaty, whereby *bona hoſtium tuto advehere non licet*; It is anſwered, that if they had been taken carrying

theſe

theſe enemies Goods, the Goods could have been confiſcat, but not the Ship; it being very clear by the Law of all Nations, that it is lawfull even for Allies to fraught their Ships to ſtrangers, in order to civil Commerce, and that to hinder this liberty, is a breach of the Law of Nations, as is very clear by the Conſtitutions of ſeveral Nations, printed lately at *Venice*, where amongſt other Articles, it is determined, *Si & navis & merces hoſtium ſint, fieri ea capientium, ſi vero navis ſit pacem colentium merces autem hoſtium* (which is our caſe) *cogi poſſe ab his qui bellum gerant navem ut merces eas in aliquem portum deferat, qui ſit ſuarum partium ita tamen ut vecturæ pretium nautæ ſolvat.* Since then by the Law of Nations, the Skipper behoved to have had this fraught pay'd, though he had been taken carrying enemies Goods, it were againſt all ſenſe and reaſon, that his Ship could have been confiſcat for carrying them: and *Camden* in the year, 1597. tells us, that *Pole* did, by their Ambaſſador complain, that the Law of Nations was violat, in that the Engliſh had in their War with *Spain*, challenged their Natives for carrying their Goods to *Spain*. And *Serviens* relates a deciſion, 12. *December*, 1592. wherein ſome Hamburgers were declared free, though they were taken carrying Corns and other Commodities to *Spain*, and becauſe they were Allies; for the Parliament of *Paris* thought, that Allies deſerved better then others.

If we conſider the Treaty with *Sweden* we will find, that Ships carrying Contraband-goods are only to be ſeiz'd on; *ſi deprehendantur*, which (like all words in Treaties amongſt Princes) muſt be taken *in auguſtiori ſenſu*; nor ſuits it with the generoſity of Kings to take little airy advantages of one another, and to debate like pedantick Formuliſts, who enſnare one another, in thin cob-webs, as ſpiders do flees: but in no ſenſe can theſe words *ſi deprehendantur*; be extended to the Ships being taken in any former Voyage, for els they had been

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ſuperfluous and impertinent, ſince no Ship can be adjudg'd, except ſhe be taken in ſome voyage: the genuine interpretation of words is, *interpretari ſecundum ſubjectam materiam*; and therefore, ſince theſe words are inſert in a Treaty, wherein His Majeſty is to indulge favours to the Swedes, they muſt be in reaſon ſo interpret, as that they may be a favour; and there is no favour indulg'd here, if theſe words be not taxative, and if they declare not any Ship free, which is not ſeiz'd carrying Contraband the time of the ſeizure.

By our Law it has been very wiſely provided, that we ſhould uſe ſtrangers in our Admiral Court, as they uſe us in their Countrey, Act 24. *Ja.* 1. *Par.* 9. And it is offered to be proven, by the Law of *Sweden*, Tar is not eſteem'd Contraband, nor can Ships be declared Prize, for what they carryed in a former Voyage; and ſince our Natives would complain of ſuch uſage in *Sweden*, let them not meet with it in *Scotland*; which is very ſuitable to that excellent Title, in the *Digeſts*, *Quod quiſque juris in alterum ſtatuerit, ut ipſe eodem jure utatur*: by the Law alſo of *England*, (as Judge *Jenkins* reports, in a return to your Lordſhips Commiſſion) no Ship is confiſcated upon this ground.

Be pleaſed (My Lords) to conſider, what great prejudices would ariſe to Trade, if Ships might be ſeiz'd, upon pretext that they carryed Contraband in a former Voyage; for by that allowance, all Ships might be ſeiz'd upon, ſince this pretext might lye againſt all, and every poor Merchant might be left a prey to the ravenous Privateers, who might force them to ranſome themſelves from the very hazard of a ſeizure: in which caſe, whatever were the event of the confiſcation, yet ſtill their time and expenſe would be loſt, and their Secrets and Papers would be made open; which is ſo great a prejudice to Merchants, that by the *Rhodian* Law, *Secreta των ναυκληρων, non licebat introſpicere, & introſpicientibus ultimum ſupplicium irrogabatur.*

It

It was likewise very fit, that the *Swede*, and all Princes should tye the Privateers to a probation that fell under sense, and such is the having Contraband-goods presently aboard, *& ubi constare potest de corpore delicti*, and not lay poor Merchants open to the hazard of the testimonies of two rogues, who being tempted by malice or avarice, might depone falsly, that the Ship carryed Contraband-goods formerly: in which they might the freelier transgresse, because they could not be control'd; whereas no such falshood is to be fear'd, if only actual carrying can confiscat a Ship; since there, the existence of the Goods precludes all possibility of error or falshood. Were it not also very absurd, to seize a Ship which possibly carryed Contraband in a former Voyage, and thereby ruine a great many Merchants who were the present fraughters of her, and who neither did, nor could know what she had carryed formerly? and yet, she being seiz'd, their Voyage would be broke, and their Fortunes ruined. Or, if another Skipper or Owners had bought her from the first offender, were it not injust to seize the Ship? and yet the Ship were Prize, if this opinion could take place; this were to punish ignorance, and Commerce requires more latitude, then such Principles can allow.

It is, I preceive, urg'd for this opinion, that the Commissions granted now, and of old, bear expresly a power to take Ships which have carryed enemies Goods; and there is a Commission produced, in *Anno*, 1628. of this tennor, together with two decisions of our Admiralty to the same effect, neither of which are concluding; for Strangers and Allyes are not obliegd to take notice of privat Commissions, which are not *leges belli promulgatæ*; these may warrand against damnage and interest, but not against restitution; and as to the decisions, they are founded upon other grounds also. It is also urged, that the carrying Contraband being a crime against the Prince or State who make the War, there is *jus quæsitum* to them, by the very commission of the crime, though the Defender

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be not then actually deprehended; as we see in other crimes, which are punishable, though the offenders be not actually deprehended: But to this it is answered, that Princes may otherwayes use their own Subjects, then they should be allowed to use Strangers; the having offended is sufficient in the one case, but actually offending is necessary in the other, for els our King might at any time, even after the War, seize upon one of these Ships, because (forsooth) there was *jus* once *perfectè quæsitum* to him by the very offence, which is too absurd a consequence to be allowed: and albeit all that was done in the course of the War, be ordinarily caveated by the subsequent Treaties, as to the Nations who were ingaged in the War, yet Allies being secured by no such Treaties, their Subjects might still be lyable to seizures, and hazards of this nature, which were both injust and inconvenient.

Consider that there is a difference betwixt such Allies, as are tyed in a League Offensive and Defensive, and such as only enter in a Treaty for their own advantage, as *Swede* has now done: the first are oblieged to assist, and therefore, all correspondence in them were a breach, but in the other it is not so, and in them that Maxim holds, that *cuilibet licet uti jure suo, modo hoc non fecerit principaliter in amulationem alterius*: though all this traffique that is alledg'd were true, yet it clearly appears, that the great design of my Client, was not to serve the Dutch, but to maintain their own poor families, in a way which the severest Lawyers could justifie. Remember how little *Swede* is oblieged to *Holland*, who kept them lately from conquering *Denmark*; So that it is improbable they would have serv'd them, upon design to promote their War. Remember how much our Countrey-men were honoured lately by their great King, who preferr'd two of them to be Generals, and thirty two to be Collonels at once in his Armies: And I must likewise remember your Lordships, that the probation in such cases is very suspicious; for there, a mans whole

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Eſtate depends upon two mean fellows, and ſuch two, as are under the impreſſions of their enemies, and who may expect at leaſt their liberty as a bribe, and that their depoſitions come to us by an Interpreter; ſo that though he did not miſtake them (as he may) yet the truſt reſolves at moſt in his ſingle aſſertion, who is but one man, and who by being the ordinary Servant of that Court, is much to be ſuſpected; and therefore, your Lordſhips may call for the Witneſſes, declare their perſons free, and thereafter examine them.

Let us not be more cruel then the Sea, and more mercileſſe then Storms, and after that theſe poor men have eſcaped thoſe, it were inhumane that they ſhould ſhipwrack upon our Laws, which were to them, like hid rocks, upon which there ſtood no known Beacon. Figure to your ſelves (my Lords) how theſe poor mens longing Wives, ſend dayly their languiſhing looks into the Ocean, as they can, to find them, or how the Creditors, who advanced neceſſars for their aliment, expect payment from their return; and how it muſt prevent the ſtarving of their poor Babes, whoſe craving apetites and cryes, do probably now aſtoniſh their indigent Mothers; it is thoſe you puniſh, and not only our appealers: and how would we uſe enemies, who had murdered our Country-men; when we thus uſe our Allies. We alledge, that this is (my Lords) a caſe wherein Juſtice will allow ſome reſpect of perſons; and ſince politick advantages have given their firſt form and being to this Law and Proclamation, whereupon this ſeizure is ſaid to be founded, conſider, I intreat you, how inconvenient it were to diſobliege by a deciſion, the King of *Sweden*, whom your Royal Maſter, who underſtands beſt the advantages of this Crown, has taken pains to obliege by a Treaty, and how hard were it, if upon your deciſion, that Prince ſhould be forced to grant Letters of Marque, or lay

an Arreſt upon all the Veſſels of our Nation trading there, by which the innocent might be oppreſt for the guilty, many might loſſe for the gain of few, and the preſent Unity of the two Crowns might be diſſolved, by a ſentence of your Court.

The Lords jointly ſuſtain'd the Adjudication, notwithſtanding of this Debate.

For

For the Burghs of Regality, againſt the Burghs-Royal.

ELEVENTH PLEADING.

Whether it be free to all the Lieges to Trade with Forreigners, or if this Priviledge be only competent to Burghs-Royal.

May it pleaſe your Grace,

SInce freedom, is one of the greateſt bleſſings, and pleaſures of mankind, thoſe Laws which deſign to abridge or leſſen it, muſt be very unſupportable, and unſavourable; except they bring other advantages, which in exchange of this bondage, can either convince our reaſon, or gratifie our intereſt. But if we conſider the Laws here founded on, whereby it is pretended, that none but the Indwellers of Burghs-royal can trade with Forreigners, we will find, that theſe Laws are ſo far from being advantagious, either to the Publick, or to privat perſons, that they are a great bondage on the one, and a great impediment to the other. The Purſuers who deſire to leſſen the freedom of Trade, are the ſixth part only of *Scotland*, who deſire to retrench the priviledges of the other five parts, and the priviledge wherein they deſire to retrench us, is our freedom, the very words of the priviledge they crave are, *that we ſhould be declared unfree-men*, and unfree-men imports, Slaves, in all Languages; and in reality, not

to have liberty to export our own Commodities, is to be Slaves to such as may stop us, for in so far as they may stop us, they are our Masters.

That they are destructive to every mans interest, appears from the restraint they lay upon his Inclinations, and upon his Property; as to his Inclinations, they are very much restrained, in so far as though any of the Lieges did never so ardently desire to trade, and though his breeding, and the situation of the place where he liv'd, did favour extreamly therein his Inclinations, yet, except he live constantly in a Burgh-royal, he cannot trade. They lay likewise a restraint upon his Property, because though the situation of his Estate be very advantagious for Trading, and his Estate consist in money, yet can he not imploy that money in Trade, which is the natural use of it; and thus in effect, these acts tend to enslave both our Inclinations and our Estates.

Nor do they lesse prejudge the publick Interest, as will clearly appear by these considerations; 1. By this priviledge, five parts of six in the Kingdom, are debarr'd from Trading; whereas it is a known Maxim in all Nations, that the moe Traders, the richer allwayes is the Kingdom; and upon this consideration, the *English* and *French*, have invited all their Gentry to Trade, by declaring, that Merchandising shall be no derogation from their Nobility and Honour. 2. The more money be imployed upon Trade, and the lesse upon Annual-rent, the Kingdom is alwayes the richer, for though privat parties may gain by Annual-rent, yet the publick Stock of the Nation is not thereby improved, the one half gains there from another, but neither from Forreigners; and if all except Burgesses be debarr'd from Trade, then the money of five parts of the Nation must lye idle, or els must be lent to Merchants, which is not ordinar; and to force us to lend, were unjust. 3. By this, the places in *Scotland* fittest for Trading, are kept bound up from using the natural advantages

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of their ſituation, to the great prejudice, of the Nation, as we ſee in many inſtances, and particularly in *Lewis* and *Burroughſtouneſſe*, to keep which from being Burghs, the Burghs have ſpent a great deal of money. 4. This has ruin'd many little Towns, who becauſe they were debarr'd from all priviledge of Trading, were forc'd to get themſelves erected in Burghs-royal, and after that they were erected, were forc'd to be at the expenſes of keeping Priſons, being Magiſtrats, ſending Commiſſioners to Parliaments, making publick Entertainments, and ſo did ruine themſelves without any advantage to the Countrey: and by this, the number of Burroughs are ſo far encreaſed, that it is a ſhame to ſee ſuch mean creatures as ſome of them, ſent to our Conventions and Parliaments, who, notwithſtanding they want both Fortunes and Breeding, yet muſt ſit as the great Legiſlators of the Kingdom, and muſt have a deciſive voice, in what concerns the Lives, Fortunes, and Honour of the greateſt Peers in it. I deſign not by this to diſparage all Burroughs, for moſt are repreſented by moſt qualified perſons; but to tax theſe Laws, which have forc'd many little Towns, either to ſend none, or to ſend ſuch as are unfit. 5. All the Countrey is ill ſerv'd, for in ſome Shires, there are but very mean Burghs, and in theſe Burghs, Merchants yet meaner, and if theſe want Credit, to buy and carry out our native Commodities, they muſt lye upon the Owners hands, and the Countrey wanting neceſſar returns, ſuch as Salt, Iron and Timber, muſt buy from very remote places. 6. If two or three Merchants in better Towns conſpire, not to buy or ſell, but at rates agreed upon amongſt themſelves, then the poor Countrey muſt be at their devotion, and this were to grant Monopolies, not only in one place, but in every Shire, not only as to ſuperfluous Commodities, (as uſe is, when Monopolies are granted) but as to all, and even the moſt neceſſar Commodities; after this, no man ſhall dare buy a Skin, Wine or Sugar, but a Burgeſſe, and which is yet harder,

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this will furniſh a pretext to Burghs to oppreſſe all ſuch as they envy, under the notion of unfree Traders. 7. His Majeſties Cuſtomes will be thereby much impair'd, for the fewer Traders be, the leſſe will be both exported, and imported, and whatever leſſens export and import, leſſens doubly His Majeſties Cuſtoms, of the which thoſe are two hands. 8. Other Nations, who underſtand Trade in its perfection, ſuch as *Holland*, do allow all their Subjects to Trade without difference, and it is a Maxim amongſt them, *That many hands and many purſes, make a rich Trade.* And it imports not to ſay, that their Common-wealth differs from ours in its Conſtitutions, and that they have vent for their Commodities all over *Europe*, whereas our vent is no larger then our conſumption; for whatever difference be in our fundamental Conſtitutions, yet in the matter of Trade, they are ſtill the univerſal Standart: and ſure, it is the advantage of our Countrey, even in order to our conſumption, to have the priviledge of Trade, in neceſſar Commodities extended to all, for the moe importers be, we will get our neceſſar Commodities at a lower rate, and the moe exporters be, our Corns, Fiſhes, *&c.* will give the greater rates, and thoſe are the two great advantages of a Kingdom.

I confeſſe (may it pleaſe your Grace) that the erecting of Societies, as to ſome Trades, and at ſometimes, is neceſſar, but the ordinar rule extends there, no furder, then that Trading to remote Nations, and in rich Commodities, ſhould at firſt have ſome priviledges as to their erections, for elſe, privat Stocks would not be able to compaſſe it; but even as to theſe, when the Trade is once ſecured, and becomes eaſie, and managable, then theſe priviledges ceaſe, with the cauſe from which they had their origine: and therefore it is, that albeit Trade with Forreigners ſeem'd at firſt above the reach of our firſt Traders, when to ſail to *Spain*, ſeem'd as har'd as an *Eaſt-India* Voyage now doth, then Trade needed ſome priviledges; yet now, when experience and encreaſe of money has leſſened

thoſe difficulties, I conceive the priviledges ſhould expire. It is known, that the Biſhop of *Glaſgow* gave only his Burgh then liberty to Trade into the Shire of *Argyl*, and that the Burgh of *Edinburgh* had a ſpecial priviledge of old, to Trade in the *Iſles*: but that now they need theſe, will not be debated even by themſelves.

I confeſſe, that all Incorporations in a Common-wealth ought to have different deſigns, and different priviledges ſuitable to theſe deſigns, as is pretended; but it can by no clear inference be deduced from this, that the ſole liberty of Trading in all Commodities with Forreigners, ſhould belong to Burghs, but only that they ſhould have ſome Staple-goods, wherein they only may Trade. And we are content to allow them, the exporting and importing of what is ſuperfluous, ſuch as Wine, Silks, Spyces, *&c.* let all, even Countrey-men, have the export and import of what is neceſſar for their own ſtation and employments, let them export Corns, Cattel, *&c.* ſince the having theſe Commodities ſignifies nothing without power to ſell them, and the liberty of importing Timber, Iron Salt, and theſe other Commodities, without which they cannot live in their own ſtation. And whereas it is pretended, that they are content we ſhould export the natural product of our own Countrey, providing we bring home money only for them, it is conceived, that this conceſſion deſtroyes what is conceded, for if unfree-men can only bring home money, then Free-men and Burgeſſes may eaſily underſell them, for few abroad buy them with ready money, and money is the deareſt of all returns; ſo that theſe who barter Commodities for what they export, may ſell much ſooner, and cheaper, if they bring home nothing in return of what they export; for export by it ſelf, without import, occaſions great loſſe, and the advantages of Merchandizing is ordinarily in the returns.

Whereas it is contended, that the leſſe diffuſe Trade be,

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it proſpers ſo much the better, for it may be eaſier govern'd according to the juſt rules. And our old Law appointed wiſely, that none but Worſhipfull men, and men of conſiderable Stocks ſhould Trade abroad, that thereby poor people, by running over ſeas, might not by their neceſſity of ſelling, or want of skill, low the prices of what they exported, and buy unskillfully at high rates what they imported; and that to defend Trade againſt this diſhonour and prejudices, Guildries were appointed in Burghs to ſuperviſe the conduct of Merchants, and reſtrain abuſes, which Burghs of Regality and Barrony wanted, and ſo were lyable to many eſcapes.

To this it is anſwered, that though at firſt, theſe rules were neceſſary, yet now when Trade is raiſed to ſome conſiſtency, this neceſſity fails with its occaſions; for there are no where poorer Traders, then within Burghs, to which ordinarily the meaneſt and pooreſt amongſt the people retire, when they cannot live elſewhere, and when they are once ſetled there, they, becauſe of the eaſie conveniences of Trading, do indiſcreetly run upon it; whereas, none who live either in Burgh of Regality, Barrony, or in the Countrey, will be tempted to adventure upon Trade, except they have conſiderable Stocks, and be ſecure of a full vent. And without debating what was the deſign of our Legiſlators, in erecting Guildries, yet we now find by experience (which is a much ſurer guide then project) that Guildries have conduced ſo little to advance Trade, that they tend rather to ſecure the Monopoly, which they at firſt procur'd, and to eſtabliſh by mutual compacts, thoſe exorbitant prices for Commodities, which are now exacted: And if Deaconries amongſt Maltmen and others, were diſcharged, to prevent combinations, I ſee not why Guildries, which are but Deaconries amongſt Merchants, ſhould not be diſcharged for the ſame reaſon.

But (may it pleaſe your Grace) the great refuge againſt theſe convincing reaſons, is, that theſe might have been urg'd,

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in jure conſtituendo, but not *in jure conſtituto*, for reaſoning ends, where Law begins, *& omnium quæ fecerunt majores noſtri, non eſt reddenda ratio.* But this may, I humbly conceive, be eaſily anſwered, if we conſider, 1. That Laws are mortal like their makers, and they who would bind up their reaſon to a conſtant adhering to what was once made a Statute, behov'd to renounce that reaſon by which they ſhould be govern'd, and leave off to be reaſonable men, that they might be Lawyers: and therefore it is, that becauſe Legiſlators might take an untrue proſpect of future events, Lawyers have determin'd, that where Laws never grew unto obſervance, they did really never become Laws, the being once obſerved is one of the greateſt eſſentials of a Law, *Statuta uſu non recepta, nec obſervata, pro non factis reputantur, Voet. de ſtatut. cap. 2. Sect. 12. arg. l. 1. §. 9. C. cad. toll. & alex. conſil. 6. vol. 1.* And if the not obſervance of Laws for ten years after they were made, is in the opinion of Lawyers, ſufficient to repudiat them, much more ought they to be rejected, after they have for many hundreds of years, languiſhed in a conſtant contempt; for els they are but like theſe idols, of which the Scripture tells us, that *they had eyes, and ſaw not, ears and heard not, and feet but could not walk*: and if we conſider theſe Laws, we will find, that even Authority of Parliament which can do all things in *Scotland*, has not been able to maintain them in thoſe; for theſe Statutes oftimes begin, *That foraſmuch, as there had been diverſe Acts of Parliament, made in favours of the Royal-Burghs, ordaining they ſhould have the only benefit of ſailing abroad*, &c. *Yet theſe Laws have not been in obſervance, therefore, &c.* as is very clear by the narrative of the 152. Act, 12. Parl. *J. 6.* and why ſhould the Act have been renewed ſo oft, if the former had been obſerved? And if in ſpight of all theſe Acts, the Subjects could never be brought to compliance with them, why ſhould we offer ſo much violence to our Native Countrey, as to force upon them that from which they have ſo much

averſion? If Acts which have been ſtrengthened by obedience and obſervation, may be repell'd by deſuetude, and a contrary cuſtome, how much more may deſuetude overcome Acts which are not yet arrived at their due ſtrength, and perfection? 2. Though theſe Acts had been once in obſervance, yet they are now antiquated by deſuetude and non-obſervance: that deſuetude may antiquat and abrogat Laws, is very clear from reading our Acts of Parliament, of which the full half are in deſuetude, and are only conſidered now by us as matters of Antiquity, as Roman Medulls, or old Hiſtories: and particularly, can the Burghs-royal deny, but moſt of theſe Acts limiting their Trade and Government, are gone in deſuetude, as that Officers within Burgh ſhould not be continued from year to year, *J.* 3. Par. 5. Act 29. They ſhould not ſail in winter, nor oftner then twice in the year to *Flanders*, *J.* 5. Par. 4. Act 30. Nor ſhould they ſail, except they be worſhipfull men, and have at leaſt three ſerplaiths of Wool, or half a Laſt of Goods, *J.* 3. Par. 2. Act. 13. *J.* 2. Par. 14. Act. 168. *Fruſtra opem Legis implorant, qui in Legem peccant:* and it were injuſt, that they ſhould obliege others to obey, what they will not ſubmit to. And that the Acts whereupon the priviledges now craved, are founded, are gone in deſuetude, appears very convincingly, from the conſtant practice of all the corners in the Nation, not by ſingle, or clandeſtine Acts, but openly, upon all occaſions, and in all places, and ages, even under the neighbouring obſervation of whole fleeces, and of all their ſucceeding ſerieſes of Magiſtrats: Have not *Muſſelburgh*, and *Borroughſtounneſſe* near *Edinburgh*, *Hamiltoun* near *Glaſgow*, the greateſt Burghs of this Kingdom, exerciſed this freedom which is now contraverted? And though they made frequent applications to your Lordſhips, yet till now was their never a Decreet *in foro* in their favours, and Decreets in abſence, are rather founded upon the omiſſions of the Defender, then the juſtice of the Purſute. So that it appears clearly,

clearly, that the Magiſtrats have been aſhamed to crave, the Judges unwilling to allow, and the people ſtiffly refractory from ſubmitting to the priviledges here crav'd to be declared.

To this it is replyed for theſe Burghs-royal, that deſuetude cannot abbrogat Laws under Monarchies, though it could under Common-wealths, *Nec poteſt tacitus populi conſenſus abrogare, quod expreſſus populi conſenſus non introduxit, l. 32. ff. de. leg. Nam cum ipſæ Leges nulla ratione nos teneant quam quod judicio populi ſint receptæ, merito & ea quæ populus ſine ullo ſcripto probavit, tenebunt omnes.* 2. Though deſuetude might abrogat ſuch Laws as reſpect only privat Rights, yet the people by breaking penall Statutes, cannot by repeated tranſgreſſion, ſecure themſelves againſt Laws made for reſtraining their inſolencies; elſe by frequent Uſury, or attending Conventicles, theſe delicts might paſſe in deſuetude, and by the Acts founded upon, the half of the offenders Goods are declared to belong to His Majeſty, and theſe Laws are in effect penal Statutes. 3. Where Laws may run in deſuetude, it is required, that the deſuetude or contrary conſuetude, be founded upon clear and open deeds, and not upon clandeſtine or precarious Acts, as in this caſe, wherein all the Trade with Forreigners, to which theſe Burghs-royal or of Barrony can pretend, was either carry'd on under the name of free Burgeſſes, or was tollerated by the neighbouring Burghs-royal. 4. It is requiſit, that the conſuetude which is oppos'd to Law, be *judicio contradictorio vallata*, which cannot be alleadg'd in this caſe, where not only no Decreet can be inſtanced, finding theſe Laws to be abrogated, but where there are Decreets produced conform thereto.

To the firſt of which it is anſwered, that though thoſe Laws ſeem to reſpect a Common-wealth, yet it is generally received now, that a contrary deſuetude may abrogat even Laws introduced by Monarchs, and that the taciturnity or connivance

of the Prince, is equivalent to a consent. Thus *Perez, tit. Quæ sit long. consuet. sunt qui scientiam principis desiderant, quia in illum omnis potestas condendi juris translata, ego tamen existimo sufficere, ne Princeps contradicat:* and for this he cites, *c. 1. de constitut. de 6.* where a consuetude is sustained to abrogat Law, though the Pope (who is a soveraign Prince in his own Dominions) did not expressly allow it, *dummodo sit rationabilis, & legittime præscripta*; and with us, do not our old Laws die out by desuetude? and do not new consuetudes dayly spring up, without any other warrand, then meer reason, and prescription: but in our case, His Majesty has so far allowed this custom, and has so far contributed with it to the abrogation of these Laws, that he has under his own Royal Hand, granted many Signatures in favours of Burghs of Regality and Barrony, allowing them to Trade with Forreigners, and extending their priviledges as far as those of Burghs-royal; which Signatures are pass'd in His Exchequer, and authorized with His Seal, which states this consuetude in a very different case from consuetudes which may abrogat penal Statutes, or such publick Laws as are made against Conventicles; the one His Majesty opposes, in the other He concurrs. And this likewise answers that other objection, founded upon the clandestinnesse of these Acts, for what Act can be more publick, then these which passe His Majesties hand, the publick Judicatures, and common Seals; and as to extrajudicial Acts contrary to the Laws, they have been too many and universal to be latent; but it is offered to be proven, that Burghs-Royal and Burghs of Barrony, have been in use openly and avowedly to drive on this Trade, which they endeavour to maintain. And whereas it is alledged, that *consuetudinis non vilis est authoritas, verum non usque adeo sui valitura momento, ut aut legem vincat, aut rationem, l. 2. C. quæ sit long. consuet.* To this some Lawyers answer, that though it cannot over-power a Law, whilst the Law stands, yet it can abrogat and make the Law fall, *Cont. ad dict. l.* and others interpret

terpret ſo this Law, as that they extend it only to a growing and unripe conſuetude, which cannot indeed abrogat a Law, that has not fully loſt its vigor, as *Cujac.* and others affirm.

As to the fourth objection, it is anſwered, that a contrary conſuetude can abrogat a Law, *ſine judicio contradictorio*; for, *judicium contradictorium* is not that which abrogats the Law, but only finds that the Law is thereby abrogat, and it doth not ſtrengthen, but declare the conſuetude; and the Lords of Seſſion, by refuſing frequently to declare this priviledge, have therein done what was equivalent to a *judicium contradictorium*; and if this be not ſuſtain'd, then the Burghs-Royal may crave, that all the Lieges may be debarr'd from tapping Wine, Spices or other things, abſolutely neceſſar for the accommodation of Travellers; for, the ſelling of thoſe is as expreſly prohibited by the Laws founded on, as is the trading with Forreigners: Nor is the conſuetude whereby theſe are abrogat, any otherwayes *firmata judicio contradictorio*, then this is; and though the Burghs-Royal declare, that they inſiſt not at this time to have their Priviledges *quoad* theſe extended, yet certainly when they have prevail'd in the one, they will crave the other. And what an abſurd thing were it, that all Travellers behoved either to lye in Burghs-Royal, or to want that accommodation which is neceſſar, or to buy it at exorbitant rates; and that not ſo much as a Candle or Penny-point ſhould be ſold, for the conveniency of the Countrey, outwith a Burgh-Royal.

I may likewiſe repreſent to your Grace and Lordſhips, that His Majeſty is not only, becauſe the Author, therefore the abſolute Arbiter of this Priviledge, and may diſpoſe upon what he hath given; but that likewiſe by the 26. Act of the 3. Seſſion of His Majeſties firſt Par. It is declared, that His Majeſty has the ſole Prerogative, of ordering and diſpoſing Trade with Forreigners; and therefore, ſince His Majeſty has granted to all Burghs of Regality, and many Burghs of Barrony, as full liberty in trading with Forreigners, as He hath granted to any

Burghs-

Burghs-Royal, I ſee not who in Law can diſpute this Privledge with them; at leaſt, how the Burghs-Royal can in gratitude debate the extent of a Priviledge with their Prince, who at firſt gave it. Nor can theſe conceſſions, in favours of Burghs of Regality and Barrony be alledged to be ſubreptitious, as is pretended, ſince they are not only paſt in the ordinary way, but are frequently paſt, *& actus geminatus facit actum cenſeri non eſſe ſubreptitium*; but likewiſe, after it hath been repreſented to His Majeſty from the Burghs-Royal, and their Agents in Court, that this conceſſion was contrary to the Priviledges granted to them by the Parliament, notwithſtanding of all this, His Majeſties Predeceſſors and Himſelf have ſtill continued to grant theſe conceſſions. And that the Burghs of Regality and Barrony have enjoyed this priviledge of Traffique and Merchandizing, is very clear by the 29. Act, 11. Par. *J.6.* wherein it is declared, *That forſomuch as divers Burghs of Barrony and Regality were in uſe to exerce the Trade and Traffique of Merchandize; therefore, that Priviledge and Freedom ſhall be continued to them.*

It hath been oft inculcat, that this Priviledge granted to the Burghs-Royal, of the ſole Trade with Forreigners, is not the meer effects of His Majeſties favour, and is not only founded upon the Parliaments conceſſion, but that it is granted to them, upon the account they pay the ſixth part of all the publick Impoſitions of this Kingdom, which makes their Contributions within Burgh to riſe ſo high, that if they had not this Priviledge to ballance that inconvenience, they would not be able to eaſe the Countrey, by paying ſo great a proportion: and if Burgeſſes within Burgh had no ſpecial Priviledge above others, they would not live within Burgh; for, it were unreaſonable to imagine, that when they might Trade as well elſewhere as within Burgh, that yet they would continue to live there, under great Burdens, and without any Priviledges.

To this it is anſwered, that the 111. Act of Parliament, *J.6.*

Par.

Par. 11. whereby it is declared, That their part of all general Taxations ſhall extend to the ſixth part allanerly, bears no ſuch quality; nor do the Acts of Parliament bear any ſuch onerous cauſe; But the true reaſon of their bearing the ſixth part of the Kingdoms Burdens, is, becauſe they are intrinſecally the ſixth part of the Kingdom, if we look either to the number, or riches of their Inhabitants: and if the Burghs-Royal were accounted the ſixth part of *Scotland*, under the Reign of King *James* the firſt, how much more great a proportion are they able to bear now, when the Burghs are ſix times more numerous, and each particular Burgh ſix times more rich and populous, then they then were? Their Riches have encreaſed with our Luxury, and the Luxury of our Age doth far exceed what it was in that Kings time; So that ſince now the Nobility and Gentry only toil to get money, to buy from Burgeſſes what they import from Forreign Countries, I conceive thoſe Burghs may eaſily bear a ſixth of our burdens, ſince once a year they get in all our Stock. And to any thinking man, it may eaſily appear, that all the money in *Scotland* doth once a year circulat and paſſe thorow the hands of Citizens: for money ſerves only either to pay our Annual-rents, or buy us neceſſars; and that which is payed for Annual-rents, is by the receivers given out to others, to ſatisfie their preſent neceſſities, and all is ultimatly employed for Food or Rayment, and little money is beſtowed upon Food or Rayment in *Scotland*, except only within Burgh.

Since then this Priviledge doth divide *Scotland* in two parts, ſince equity in it ſeems to oppoſe Law, and ſince both parties pretend to national advantages: I ſhall humbly move, that if this illuſtrious Senat be unwilling to interpoſe in ſo univerſal a difference, that this Debate ſhould be tranſmitted by them to the Parliament, which is the full Repreſentative of all the Kingdom, and the natural Judge of equity and convenience.

The Seſsion referr'd this Caſe to the Parliament, who extended this Priviledge to all the Lieges.

For

For the Earl of *Northesk*, againſt my Lord Treaſurer-Depute.

TWELFTH PLEADING.

Whether a Novo Damus *ſecures againſt preceeding Caſualities.*

My Lord Preſident,

IT is one of the chief advantages of our Nation, in this Age, that we live under a Prince, who covets more the hearts of his Subjects, then their Eſtates; and who loves rather to ſee his Laws obey'd, then to have his Advocat prevail: What meaſure then can his fisk expect, when in general, all Lawyers have even under Tyrants delivered, as their opinion, *ſemper contra fiſcum in dubio eſt reſpondendum?* And ſince flattery or fear may encline ſome, to favour the Princes Intereſt too much; it is fit, that Judges ſhould be jealous of their own ſpirits in ſuch caſes, and ſhould bend them, rather to the other ſide, that they may fix at laſt in a ſtraightneſſe.

The caſe propos'd is, whether the *Novo damus* not expreſſing the caſuality of Marriage ſpecially, but all Caſualities in general, doth by our Law, defend againſt the Marriage?

That it doth, I preſſe for my Client, upon theſe grounds; Firſt, a *Novo damus* is that, which the Feudaliſts, call *renovatio feudi*, and *renovatio feudi* doth import, *liberationem ab omni caduci-*

caducitate; nay, the very nature of a Diſpoſition or Alienation doth imply, a liberation from any burden, with which the Diſponer could affect it; elſe he ſhould alienat and yet retain, give and not give; and therefore, by the civil Law, he who diſpon'd Land, was interpreted to have diſpon'd it *tanquam optimum maximum*, free from all the Diſponer could lay to its charge.

If any perſon ſhould diſpone his Land to me, and ſhould thereafter crave a Ward or Marriage, as due out of theſe Lands *tanquam debitum fundi*; certainly it would be an abſurd purſute, and I would be abſolv'd; nay, if a Superior enter me to my Lands, *eo ipſo*, I am free from all preceeding caſualities; nor did ever a Vaſſal take Diſcharges at his entry of any former caſualities, but his entry was alwayes judg'd ſufficient; why then ſhould not His Majeſties Vaſſals be in the ſame condition? for ſince this is clear in other Vaſſals *ex natura feudi*, there being no Statute in their favours, it muſt be due to all Vaſſals; for, *à quatenus ad omne valet conſequentia*; and that which is natural to Few's, muſt be inherent in all Few's. The deſign of a *Novo damus* is, to ſecure the receiver againſt nullities; the Law thought to ſet this as a March-ſtone, and let not us remove it. The ſtile of a *Novo damus* in our Law, which is equivalent to expreſſe Law, is very exactly adapted to this deſign, as may appear by all its Clauſes; for, when His Majeſty *de novo dat*, that Chartor muſt be equivalent to an original Diſpoſition; and ſure, if theſe Lands had belonged to His Majeſty, and if he had diſponed them, that original Right would ſecure the receiver, againſt all His Majeſty could crave out of theſe Lands, except in ſo far, as he did expreſly reſerve at the making of the Diſpoſition; nor do I ſee, why reſervations of former Rights were neceſſar in Diſpoſitions, if theſe Rights were reſerv'd without them, and if they were not cut off by the Alienation it ſelf.

But, not only doth this *Novo damus* dispone in favours of my Client, the Land out of which these casualities are sought, but it dispones them; *cum omni jure, & titulo, interesse & juris-clameo; tam petitorio quam possessorio, quæ nos, aut prædecessores, aut successores nostri, habuimus, habemus, vel quovis modo habere possumus, in, & ad, dictas terras.* What can be more expresse? for if His Majesty had any claim to, or right in, these Lands, any manner of way, he here dispones it, and transfers His Right, in, and to my Client; if His Majesty have any Right at all, it must be *vel jus, vel interesse, vel juris-clameum*; and if it be either of those, it is dispon'd: But lest it might be pretended, that this Clause extended only to secure the Property (which is not its only effect, as I shall clear hereafter) Therefore, the stile of a *Novo damus* bears *omne jus, non solum quoad aliquam ejus partem, sed & ad omnes census, firmas, & proficua, ratione wardæ, purprestura, foris facturæ, non introitus, escheta, &c. vel quocunque alio jure, vel titulo*: From which general Clause, I draw these inferences; first, that this general Clause must seclude His Majesty, since *tantum valet genus quoad omnia, quantum species quoad specialia*, *Bald. consil. 1, lib. 3. Gemin. consil. 65. & l. si duo ff. de admin. tut.* And therefore, since a special gift of this Marriage would have secluded the King or His Donator, a general concession must do the same, especially since this general was designed to secure against all, in respect particulars could not be remembred; even as we see in general Discharges, or Renunciations, which are as valid *quoad* all, as any particular Discharge can be, as to a special debt or deed; and since this general Discharge of all former Casualities, is so oft repeated, and represented under so many various terms, which can signifie nothing, if they did not expresse the exuberant will and inclination of the Prince, to denude himself, and secure his Vassal, aginst all former Casualities, as well Marriage as others: and this Clause is equivalent to that Clause spoken

of

of by the Doctors, *quovis modo vacet*, which comprehends *omnem modum vacandi, & omnes formas excogitabiles renunciationis, Cap. consil.* 14. 2. General Clauses subjoyn'd to specials enumerat, must be extended at least to all such specialities, as are of the nature of the specialities enumerat; for, the subjoyning a general to specials, is designed to supply the not enumeration of other specialities which are homogeneous, *clausula generalis quæ sequitur casus speciales enumeratos, extenditur ad similia specificatis, Socin. consil.* 316. But so it is, that the casuality of a Marriage is of the same nature, with many casualities here specifically expreſt, such as Ward, Non-entry, Escheat, *&c.* to which the Superior having right in the same way as he has to Marriages, it is presumed, he would discharge it in the same way with them. 3. General Gifts must be extended to such particulars, as probably the Granter would have gifted if they had been expreſt; but so it is, that it is beyond all doubt, but, that His Majesty, if he had been asked, whether he was content to dispone and gift the Marriage, he would have consented very freely to gift the Marriage, as well as the other Casualities, this Marriage must therefore passe under the general; and how can it be thought, that he who granted all other Casualities, would have refused this? or what speciality was there in this Casuality, which might have occasioned this refusal? *Nam generalis clausula idem operatur, quod specialis, ubi non subest ratio diversitatis, Curt. consil.* 19. and upon this ground it is statute, that general clauses in Remissions, shall be extended to all crimes of lesse gravity, then the chief crime which is expreſt, Act. 62. *J.* 4. Par. 6. and if great crimes can be taken away by general clauses, sure it cannot be denyed in civil Casualities, which are of their own nature easier pardon'd, and of lesse consequence: and by that Act, it is clear, that the general clause was extended formerly to all, even greater crimes then the crime specified; and if a Statute was necessar there, it is much more necessar here, els the

general clause cannot be restricted. Sure he who granted the Property, would not stick at a Casuality, he who granted the greater, would not stick at the lesser; he who granted so many Casualities, would not stick at one; he who granted all the others of that same nature, would allow this to passe with its fellows; and he who granted Ward, which is the cause of Marriage, would not have refused, to grant the Marriage, which is but an effect and consequent of that Ward: And this leads me into another Argument, upon which I lay very much weight; His Majesty has here gifted *omnia profitua & devorias quæ contigerunt ratione Warde*, but so it is, that Marriage is a Casuality *proficuum & devoria*; which falls by reason of Ward-holding: and so *contingit ratione Warda*; for, Ward here is taken not as a naked Casuality, but as a holding, and therefore it is, that when by the stile of a *Novo damus*, all Casualities are enumerated, Marriage only is not specified in the old Signatures, because that casualitiy was still lookt upon, as comprehended under the general, *omnia profitua ratione warde*. Not only do many general terms of this *Novo damus* secure against this and all other Casualities, but His Majesty in his concession, expresses all the wayes of transmission, whereby these Casualities could be given by him to his Vassal, *viz. renuntiando, transferendo, & extradonando eadem, cum omni actione & instantia*: and in contemplation of this Right, His Majesty has a considerable composition in Exchequer, which makes this to be not only a Gift, but a Bargain, not only meet Law, but Equity.

To ballance these reasons, it is represented for His Majesty, and his Donator, that all his Majesties concessions are gratuitous, and must not be too largely extended, for what compositions are payed, are rather payed as fees to his Majesties Officers and Attenders, then as a price, and these are too low, and unproportionat, to what is given, to deserve that name. 2. That his Majesty cannot be prejudg'd by the negligence

ligence of his Officers, and what he passes in favours of his Vassals, deserve a far other construction, then what is done by other Superiours; and though general Clauses may carry away Casualities from them, because it is presum'd, that they have leisure to ponder every word, in any Right they grant, yet His Majesty being loaded with the weighty affairs of the Nation, cannot vaick to so exact observations; and therefore it was thought fit, that the negligence of His Officers, nor the importunity of parties, should not prejudge him. 3. That the gift of a Ward, *per se*, would not carry the Casuality of Marriage, if it were not expresst; *ergo*, Marriage could not be comprehended, under the Casuality of Ward which is here expresst. 4. That general Clauses are in many cases but *error stili*, and are restricted by the decisions of all our Courts; thus though the stile of a Gift of Escheat, doth dispone all moveables which the Rebel had, or shall acquire; yet, these Gifts are restricted by our decisions, to what the Rebel had, the time of his rebellion, or should acquire within a year after the rebellion: though Gifts of Ward and Marriage bear, ay and till the entry of the next lawfull Heir, yet these Gifts are restricted to three terms Non-entries, subsequent to the Ward; and though Gifts granted do bear *relief*, yet they would not carry a right to the *relief*. 5. That the design of a *Novo damus* is to secure the Property, but not to transmitt a Right to any Casualities not expresst; and thus the King might, notwithstanding of a *Novo damus* crave bygone Few-duties; nor would it debar His Majesty from craving Taxt-wards or Marriages, as was decided in the case betwixt His Majesties Advocat, and *Pierstoun*, where it was found, by the Exchequer, that Marriage was not comprehended under the *Novo damus*, because it was not expresst.

I am not, my Lords, willing to lessen His Majesties favours to His Subjects, who were not worthy of them, if they undervalued them; and therefore, I beg leave rather to magnifie

nifie them ſo far, as to think, that they ſhould not be interpret ſo narrowly, as to bear a proportion to our deſerts, (for the favours of Princes cannot, like his whom they repreſent, be merited) but ſo auguſtly and opulently, as may bear a proportion to the greatneſſe of him who diſpenſes them, as *Clarus* and all the Feudaliſts obſerve; and if the word can admit a large interpretation, the grants of Princes ought to have it: So, that ſince theſe general clauſes would carry all Caſualities in Gifts granted by privat Superiors, much more ought this to be allowed *in auguſtioribus principum conceſſionibus*, eſpecially in Diſcharges granted by them of all former incumberances, which being of the nature of Indempnities, ought like them to be interpret all poſſible wayes to defend the poor Vaſſal. Nor do I deny, but the negligence of His Majeſties Officers ſhould not prejudge His Intereſt, yet, Gifts granted cannot be called negligence; for the one is an omiſſion, and the other a commiſſion; the one is a privation, and the other a poſitive act; the deſign of that Statute was to defend His Majeſty againſt the omiſſion of His Officers, ſuch as the ſuffering His Rights to preſcrive, or omitting to propone Defences for him; and the words of the Act 14. *Par.* 16. *Ja.* 6. are, *that in the purſuing or defending any of His Actions or Cauſes, the negligence of His Officers omitting any exception, reply*, &c. *ſhall not prejudge him.* But God forbid that every Gift granted by His Majeſty, and paſt by his Exchequer, might be thereafter queſtioned, becauſe a ſufficient compoſition was not payed, or that it was not founded upon a ſufficient cauſe; for elſe, all our Signatures and Rights might be queſtioned; this were to unhinge all our Securities, and to endanger all His Majeſties Officers; but how can what is paſt His Royal Hand, be thought to be paſt by the negligence of His Officers? And how impertinent were it, for his Officers alwayes to ſtop what His Majeſty commands?

I confeſſe, that the Gift of a Ward *per ſe*, would not carry Marriage; but if His Majeſty did grant *omnia proficua ratione Wardæ contingentia*, though in a ſingle Gift, I think it would give right to the caſuality of Marriage; and yet, that caſe would not be ſo ſtrong as ours; for in ſingle Gifts, it is proper to expreſſe Caſualities diſpon'd, but in a *Novo damus* it is otherwiſe; for the deſign there, is by the enumeration of all ſpecial Caſualities, and by ſubjoining a general to theſe, thereby to ſecure againſt all theſe Caſualities.

To what is founded upon the errors, that are in many of our Stiles, I need only anſwer, that *regulariter ſtilus æquipollet juri, & pro Lege habetur, l. ſi quando C. de injur.* Bart. *in l. peritos ff. de excuſ. tut.* And therefore, though as Laws may be abrogated or reſtricted, ſo Stiles are ſubject to the ſame frailty; yet, unleſſe it can be made appear, that theſe Stiles are reſtricted by the conſtant current of Deciſions, or by ſome expreſſe Laws, certainly, Stile muſt rule us: Stiles are the product of common conſent, and are introduced after much experience, by ſuch as underſtand; they are to Lawyers, what the Cart is to Geographers, or the Compaſs to Sea-men; and this is ſo far from being convell'd, that it is eſtabliſhed by the inſtances adduced, by the Donator for Gifts of Eſcheats and Non-entries, did take place according to the latter, till they were reſtricted by expreſſe Acts of Exchequer: and ſure theſe Acts had been needleſſe, if the Stile had not been binding, before theſe Statutes drawn backwards, but having a future obligation only, every man knew how to compone or tranſact for them accordingly.

As to the inſtance of Reliefs, by-gone Few-duties, Taxt-duties of Ward and Marriage (which was *Pierſtons* caſe) it is clear, that the reaſon why theſe paſſe not under general Gifts is, becauſe they are liquid, and ſo cannot be compon'd for, in Exchequer, as *Hope* well obſerves, for theſe are no contingencies; and ſince the Law gives right to any thing in a Signature, becauſe it is compounded for; therefore, in juſtice theſe things

cannot

cannot be comprehended in a Signature, which are not compounded for. We have likewiſe an expreſſe Act of Parliament, appointing that Reliefs ſhould not be compounded for, which draws out theſe from the common objection, and ſtates Reliefs in a caſe far different from ours.

And though it be much urg'd, that His Majeſty having taxt the caſuality of Ward and Marriage in this Gift, it is moſt preſumable, that He would have expreſt the caſuality of Marriage, if he had deſigned to have tranſmitted it, ſince that caſuality was then under conſideration: Yet, this is but a remote conjecture, and muſt cede to the ſtronger preſumptions urg'd in the contrair; and ſince the Signature is not drawn by His Majeſties order, but by the Vaſſal, the preſumption ceaſes; and it is more preſumable, that the Vaſſal would have expreſt this caſuality, had he thought it neceſſar: and whatever might be urg'd, if this caſuality of Marriage had been expreſt, but had been delet; yet there can be little difficulty, where the Signature was preſented without it, and where the Vaſſal reſted upon the general Clauſe.

All the Lawyers of our Nation have adviſed, that this *Novo damus* did ſeclude Marriage, though not expreſt; all the people have eſteem'd ſo, and upon that eſteem, they have bought and ſold accordingly, Rights carrying ſuch a *Novo damus*; So that whatever may be done as to the future, yet ſince ſo many have compon'd with His Majeſty for ſuch Gifts, in contemplation they carryed all Caſualities, and that ſo many have given conſiderable ſums to ſuch as had compon'd for them, upon that conſideration; Since this opinion was ſo old and univerſal, and ſince ignorance in it (if it be an error) was ſo invincible, being warranted by the advice of the ableſt Lawyers; I cannot ſee how in Law *quoad preterita* it can be otherwiſe interpret, whatever fate it may have for the future.

The Lords found, that a Right granted by the King, with a Novo Damus, *did not only ſecure the Property, but ſeclude all Caſualities that were expreſt; but that it did not defend againſt Caſualities which were not expreſt.*

For

For *John Johnſtoun*, againſt *James Hamiltoun*.

XIII. PLEADING.

Whether a Contract entered into by a Minor, who averr'd himſelf to be Major, and ſwore never to reduce, be revocable.

THE Law might ſeem a ſevere Maſter, if it only impoſ'd upon us what we were to obey, and exacted from us an intire ſubmiſſion to what it did command: but in recompence of our ſubmiſſions, it returns us its protection, it doth ſupply want of ſtrength in the weak, when they are ingaged againſt the ſtrong; want of wit in the ſimple, when they are ingaged againſt the ſubtile; and want of age in Minors, who would otherwayes be very eaſily circumveened: it appoints its Judges to be their Tutors, and whilſt ſuch as rely upon their own wit, may be circumveened, they are by its aſſiſtance plac'd beyond all hazard.

Amongſt thoſe other Minors, who dayly come to crave from you, the reduction of what they did in their Minority, none was ever more favourable then my Client, he being a perſon, who becauſe of the lowneſſe of his parts, and meanneſſe of his breeding, is like to continue very long a Minor. And if ſharpneſſe, *& malitia*, can in ſome caſes foreſtal Majority, and almoſt meet it half way, certainly want of wit and ordinar ſagacity, ſhould extend the priviledge of Minority. The perſon by whom he is læs'd

being his own Kinſman, and one in whom he confided very much, pleads likewiſe for a more liberal reparation, and the ſame principle which makes murder under truſt to be treaſon, ſhould likewiſe make the leſion here to be more eaſily reparable, and ſhould not only weaken the Defences, but ſhould likewiſe be a ſufficient ground to repell ſuch as were of themſelves relevant: and the leſion here, is not one of theſe ſmall injuries, but is a great and conſiderable loſſe, wherein the Minor has not only been induced to ſell his Land, though the Law appoints, that a Minors Land ſhould not be ſold, but by the Authority of a Judge; but to ſell his Fathers Heretage, tranſmitted to him by a long *ſeries* of Anceſtors, and to ſell it too without the conſent of his Curators, who are the only perſons who ſhould defend and ſupply his infirmity.

Againſt theſe reaſons, it is debated for the Defender, that though Minors have great priviledges allow'd them in Law, yet many cauſes may occurre, wherein it were unjuſt to proportion exactly the prices of what they ſell, with the ordinar prices of what is ſold; and the ſame equity whereupon their priviledge is founded, may make ſuch exactneſſe, not only to appear to be, but really, to be rigour. As if a Minor ſhould, to free him from the Gallies, obliege himſelf to ſell Land at an eaſie purchaſe, to one of his Countrey-men, who were then in a Forreign Country with him, and from whom he could only expect money, and which money being to be beſtowed upon Merchandize in theſe Countreys, might produce far greater advantage to the Merchant, then the Land could; which, and many other inſtances, may clearly evince, that if Minors had not ſome way whereby they might ſecure ſuch as would contract with them, the Law would ſecure them, but as it doth priſoners, and which was deſigned to keep them free, would take their freedom from them; and therefore, the Law has introduc'd, that Minors being in *confinio majoritatis*, may ſubjoyn an oath to their Contracts; which oath is, becauſe of its

divine

divine character, and of the reverence thats due to that great God, who is called upon as witneſſe in it, by all Chriſtian Lawyers declared to be ſufficient to fix and corroborat the Contract to which it is ſubjoyn'd. For, the Law of God oblieging every man to obſerve what he has ſworn, even though to his prejudice, it were unfit that the Laws of men ſhould be more binding than thoſe. Likeas, by the common Law, *l. 1. c. ſi adverſus venditionem*, an oath confirming Vendition is declared binding, *Nullam te eſſe contraverſiam moturum, neque perjurij me auctorem tibi futurum ſperare debuiſti.* And *authent. Sacramenta puberum*, doth expreſly tell us, that *Sacramenta puberum ſponte facta, ſuper contradictibus rerum ſuarum non retractandis, inviolabiter cuſtodiantur.* Which is likewiſe obſerved by our Law, the laſt of *February*, 1637. and by a late deciſion, 10. *February*, 1672. Mr. *George Wauch contra* Bailie of *Dunraggat*. But not only has this Minor oblieged himſelf upon oath, not to revocke, but he hath likewiſe declar'd upon oath in the ſame Bond, that he was Major, and Majority being that which cannot be known by the eye, and there being no liquid and preſent proof of a Minors age, the Law ſhould have prejudg'd Commerce very much, if it had not allow'd that a Minor aſſerting himſelf to be a Major, ſhould notwithſtanding be reſtor'd againſt his own declaration: for by this, not only ſhould Minors be diſabled from getting money to do their neceſſar affairs, but likewiſe Majors behov'd ſtill to wait till they ſhould get an exact probation of their Age; which probation is very difficult with us, where there are no certain Regiſters; and conſequently, Majors might, becauſe the probation of their Majority could not be preſently inſtructed, be very much prejudged, and ſometime the probation of Age, being that which cannot appear convincingly to the ſight; and that being a caſe, wherein ſuch as contract with Minors might be cheated, it was very juſt, that ſince the Law deſigned only to aſſiſt Minors that were cheated, that it ſhould not give the ſame pri-

viledge to such Minors as cheat others, by asserting themselves to be Majors, *l. 2. Si min. se major. dixerit. Si is qui minorem nunc se esse adseverat, fallaci majoris ætatis mandacio to deceperit, cum juxta statuta juris, errantibus non etiam fallentibus minoribus publica jura, subveniant, in integrum restituti non debet.* And since *Diocleſian*, who was not only no Christian, but a persecuter of them, did bear such respect to an Oath, what respect ought it to have from Christian Judges, who if they suffer this Oath to have no effect, are the occasion that the Name of God is taken in vain?

Minors may be punish'd for perjury, falshood, and cheating, and therefore, it followes neeessarily, that they may much more be bound by Oaths; for it were injust to punish them for perjury, if they understand not perfectly the strength and efficacy of an Oath, and if they do understand that, there is no reason to absolve them from it: and if it can bind them to severe and corporal punishments, it can bind them much more to the performance of civil Contracts.

Nor can it be deny'd, but that our Law respects so much an Oath, and finds it so obligator, that deeds done by Women in favours of strangers, *stante matrimonio* are null, though ratified by an Oath, as was decided 18. *February*, 1663. *Brisband contra Douglas*; at which time, the Lords were of opinion, that all obligations which are *ipso jure* null, such as obligations made by Women *stante matrimonio*, and by Minors having Tutors and Curators, but without their consent, are still null, though they be ratified by an Oath: and if this be true, as is acknowledged, they contend, that there is no reason why all Contracts entred into by Minors should not be valid, for the obligation of an Oath lyes in the hazard of perjury, and in the religious respect which Lawyers have to Oaths; and in point of Conscience, what difference is there betwixt Contracts *ipso jure* null, or such as are not so? God takes no notice of such subtile differences, and since the Oath is the same in both,

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why ſhould it not produce the ſame effect? It is the Oath which in this caſe oblieges, and therefore, though the Contract were null, yet the Oath ſtill binds, and ſubſiſts, though annext to an null Contract, even as a null Contract may be ratified, or homologated. And that Contracts upon Oath, do bind Minors, though they have Curators, and though they ſubſcribe without their conſent, is maintain'd by moſt famous Lawyers, as *Andreolus, contraverſ.* 202. *Eſt enim hæc opinio (inquit ille) fundata in religione juramenti, quæ ſemper militat, ſive Minor habeat Curatorem, ſive non, & conſequenter cum religio juramenti, & odium perjurii in utroque militat caſu, in utroque etiam debet manere effectus.* Other Lawyers aſſure us, that *juramentum Minorem, repreſentat Majorem*, and therefore, ſince Majors are bound, and Minors ſwearing are Majors in the conſtruction and interpretation of Law, Minors ſwearing ſhould be alſo tyed by theſe Contracts. Nay ſome have ſaid, that *juramentum fingit Minorem non habere Curatorem. Bald & Corn. ad auth. ſacramenta pub.* And according to the Canon Law (which *Craig* ſayes, we follow in what concerns our conſciences) *juramentum ſemper eſt ſervandum, quotieſcunque poteſt ſervari ſine diſpendio ſalutis æternæ.*

It is likewiſe alledged for him, that *Minoribus deceptis, non decipientibus eſt ſuccurendum*; becauſe there, the want of wit, which is the ground of reſtitution, ceaſes; and it were alſo unjuſt, that this remedy ſhould be abuſed againſt the deſign of the Legiſlator; nor ſhould the Minor have the protection of that Law, which he has offended: But ſo it is, that its offered to be proven here, that the Minor was a perſon traffiquing upon his own account, and ſuch cannot be reſtored, *Fortia de reſtit. min. part. quæſt.* 23. How dangerous were it, if ſuch as were Merchants, and common Traders, ſhould be repon'd? for then, who ſhould Contract with them, or how could innocent people be ſecured? That ſame neceſſity and publick intereſt, which introduced the priviledges of Minority, has

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likewiſe introduced many other priviledges in favours of Commerce; and ſince it were diſadvantageous to debar Minors from Trading, it were unreaſonable to ſtate them in a condition, in which their Trade would be ineffectual; for who would bargain with them, or beſtow truſt upon them, if their tranſactions could be reſcinded upon the pretext of Minority? It is (ſay they) to be preſumed, that experience and art (learned by them whilſt they were practiſers) doth ſupply the imbecillity of their greener years, and ſince by learning and art, ſuch as are very young do outſtrip very far ſuch as are of riper years, and attain to very much exactneſſe in the ſubtileſt Sciences, why may not application refine them alſo to a ſufficient conſiſtency in merchandizing, in which there are no ſuch myſterious points? Upon which account, even our Law has introduced, that Advocats, Nottars, and others in publick Offices, cannot revock what they do in their Minority, as was decided, *19. July. 1636.*

If, ſay they, the Minor was forced to ſell his Heretage, it was to redeem his perſon from priſon, and freedom is preferable to Heretage, becauſe liberty can pleaſe without Heretage, but Heretage ſignifies nothing to one who wants liberty; and for this Heretage my Client gave out his money, by which he had raiſed himſelf to a conſiderable Fortune, and being forced by want of this money to quite his Trade, he did looſe hope of gaining a greater Eſtate, then that which the other ſold: but this he did to prefer his friend to his hopes, and ſo this frendſhip and relation which the Purſuer would make the foundation of a Cheat, was indeed the foundation of this favour, and the Law preſumes, that his Couſen would not have cheated him.

Notwithſtanding of all which plauſible repreſentations, I humbly conceive, that the Minor my Client ought not to be tyed by this Oath; and that what I debate in his favours may be the better underſtood, your Lordſhips will be pleaſed

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to consider, that all civil poliſh'd Nations, have in effect reſigned ſo far their liberty to their Legiſlators, that theſe in their Contracts, are to be ruled by thoſe in their Statutes: and God Almighty is more concerned in the œconomy and government of the World, then in the obſervation of privat Oaths; and therefore, we muſt conſider more the force of a Law, then of an Oath; and if privat Oaths amongſt parties could derogat from publick Laws, then the publick Laws ſhould be abſolutely evacuat, and remain as the empty ſhadowes of what they ought to have been. And from this I infer, that ſince the Law has thought fit to declare all deeds done without the conſent of Tutors and Curators to be null, that no deed done by any Minor having Curators, can bind him, except he be authoriz'd by their conſent.

And from the ſame principle, I likewiſe infer, that the former diſtinction made in Law, betwixt ſuch deeds as are *ipſo jure* null, and ſuch as are not *ipſo jure* null, but are only reduceable, is ſo far reaſonable, in relation to this contraverſie, that though deeds that are *ipſo jure* null be not reduceable, if they be not confirmed by an Oath, yet deeds that are *ipſo jure* null, are reducable though ſworn; for in caſe the deed be *ipſo jure* null, it is reprobated by Law, and ſo is no deed in the conſtruction of Law; and if it be no deed, it cannot be confirmed by an Oath, for a confirmation preſuppoſes a pre-exiſting deed, *ſed non entis nullæ ſunt qualitatis nec accidemtia*; and ſo this Oath wants here a baſis upon which it can be fixt. 2. It were unfit, that what the Law has expreſly condemned, it ſhould allow others to evite, for it ſhould thus cheat it ſelf out of its own authority, by ſuch indirect courſes, *Et quod directè fieri non licet, nec per ambages fieri licet.* In vain were Laws to be made, if every privat man might enervat its force, and evite its ſanction by ſuch ſubterfuges; this were to invite men to break and ſcorn Laws, to allow them to tear off their own yoak, and to place every privat man above the Legiſlator.

And

For, as Oaths exacted by Magiſtrats obliege not, when they are contrair to the Laws of God; ſo the Oaths of privat perſons obliege not, when they are expreſly contrair to the Laws of our Rulers, who are gods upon earth. And as vows are declared null by God himſelf, if given by a Maid without the conſent of her Father, ſo ſhould Oaths for the ſame reaſon not obliege ſuch as have Curators, for theſe are the Parents in Law. 3. No Oath can be *vinculum iniquitatis*, the tye of injuſtice; but ſo it is, that where a deed is declared null by the Law, that deed is in ſo far injuſt; and to allow a deed that is injuſt becauſe it is ſworn, were to eſtabliſh injuſtice by an Oath, and to put it in the power of every privat perſon, to alter the nature of things, and to make that juſt which is injuſt. 4. This would diſappoint the cares and pains of the civil Magiſtrat; for, his deſign being to ſecure our poſterity, becauſe of the imbecillity of their Judgment, that would be abſolutely eluded, and poor Minors would by that ſame want of Judgement and ſagacity, for which their deeds are reduceable, be induced to ſwear, and ſo the remedy will become effectual, *nam eadem facilitate juvant qua contrahunt.* And ſince Minors cannot be oblieged in their Minority, becauſe of their imbecillity, Oaths ſhould not bind them, except it could ſupply that; and ſince the Law has given them Curators, it is juſt the deeds done by theſe Minors ſhould not be reſpected in Law, ſince the forms preſcribed by Law are not obſerved, nor the reaſon ſatisfied whereon it is founded. 5. This would open a door to perjury, for ſuch as could not cheat Minors, becauſe of their leſſe age, would cheat them by their Oaths; and thus, Oaths which ſhould not be given but upon ſolemn and extraordinary occaſions, would become cheap, and would be taken in every Ale-houſe, adminiſtrat by every Nottar or his Servant, and the beſt of tyes would oftimes be us'd in the moſt ſinfull occaſions: and how can ſuch Oaths as theſe obliege, ſince they want all the three qualities of an Oath, and for which, Oaths are declared

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in Scripture to be obligatory? and theſe are, that they ſhould be *in truth*, *in judgement*, *and in righteouſneſſe*. I know, that every man may renunce what is his own intereſt, but this Maxime holds only where men underſtand their own intereſt, but not in Minors, who want that ripeneſſe of Judgment, by which their Renunciations are ſuſtain'd. And that the Oath is obligatory, though not the Contract, is but a meer quible, for there is no action ariſing in common Law from an Oath, *qua tale*, *Bart. ad l. ſi quis C. de fidejuſs. Imol. ad c. cum contingat de jure-jur.* Such an Oath oblieges in Conſcience, but not in Law, and though it be the ſubſtance in the one, it is but an accident in the other.

I need not debate here, that the *authentick Sacramenta puberum*, aſcribes only this cogency to Oaths which are given *tactis ſacroſanctis evangeliis*, which though it may ſeem but a ſolemnity, yet has great force with it, in my opinion; for ſolemnities do raiſe up the attention, and obliege more the ſwearer to advert to what he is promiſing: and if Witneſſes and others come to age, need theſe advertiſments, much more do Minors need them, ſince they are oft overtaken by inadvertence. And as this caution ſeems not to have been unneceſſarily adjected by that excellent Law; ſo *Seraphinus* and others have required neceſſarily, that ſolemnity in ſuch Oaths as theſe, *antiqui quo major eſſet jurisjurandi religio, pleraſque adinvenerunt ceremonias, quæ jurantibus terrorem ac formidinem incuterent*, *Ann. Robert. Pag.* 188. and ſwearing by touching ſomewhat that was ſacred, was very old. *Virgil.*

Tango aras medioſque ignes & numina teſtor.

Juſtin. alſo, *l.* 22. relates, that *Agathocles* ſwore a confederacy with the Carthaginians, *expoſitis tactiſque ignibus cereis*: and by all our old Evidents it is clear, that ſwearing upon the Bible or Altar, was uſed in all extraordinar caſes. And for the ſame reaſon, Oaths in Writ have been oft-times little reſpected by Lawyers, becauſe the Writ is oft-times not read nor conſidered,

and passeth by too transiently to have all the force which a solemn and judicial Oath deserves, *vid. Bart.* and *l. qui jurasse, ff. de jure-jur. & sachin. contrav. lib. 3. cap. 8.* So that we should either not seek the benefit of these Laws, else we should make use of the forms and ceremonies which they prescribe.

As to the assertory Oath, by which the Minor swore that he was Major, it is answered, that such Oaths ought not to be respected further then as the above-cited Laws declare, which is, that these Oaths ought to be believ'd, except the contrair can be proven by Writ, and that the truth and strength of this probation cannot be taken off, and enervat by Witnesses, for a Writ is a more binding, and concluding probation then Witnesses, who may be mistaken, or may be corrupted. *Si tamen in instrumento per sacramenti religionem majorem te esse adseveraſti, non ignorare debes, excluſum tibi esse in integrum restrictions beneficium, nisi palam, & evidenter ex instrumentorum probatione, per non testium depositiones te fuisse minorem ostenderis.* But here it is offered to be proven, by the Register of the Church-session where my Client was baptized, that he was Minor the time of the transaction, and by this your Lordships may see, how dangerous it were to make such Oaths as these binding, and how easily Minors may be induced, not only to bind, but to damn themselves, and how little this person deserves, who was the occasion and sollicitour of the perjury: were not this to baffle that sacred tye, by which Princes bind their Subjects to a secure obedience, by which Judges obliege men to reveal the truth, and by which every privat man is secure, when he referreth to his adversars Oath, the truth of what is contraverted amongst them. Nor can the Defender maintain this Contract, as entered into by my Client, who was a Merchant by his profession, since though that may defend such as Contract with him, in things relating naturally to his Commerce, yet that should not be extended to such Contracts

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as these, wherein my Client is bound to sell his Heretage at too low a rate, *Et quæ ex necessitate per modum privilegii introducuntur, ultra casus necessarios non extenduntur.* Lands are not the subject matter of that traffique which the Law doth priviledge; but on the contrar, Lands is not allowed to be sold, without the consent and sentence of a Judge: nay, and even these *qui veniam ætatis à principe obtinuerunt*, will be restored against the prejudice sustained by them in selling their Heretage, *l. 3. c. de his qui veniam ætat.* albeit no man could *impeterare veniam ætatis*, till he was past eighteen, and was proven to be prudent and frugal, *l. 2. C. eod.* which is all that can be alledged against this Minor. Nor should our Law respect much *confinium majoritatis*, since they have shortened too much the years of Minority, in making it end at twenty one; whereas, the Romans and others who were sooner ripe, and more sagacious then we, extended Minority to twenty five: and since our times are more cheating then theirs, it was fit that our Minority should have been longer then theirs. But however, both of us agree, that *minorennitas computanda est de momento in momentum.*

To conclude then (my Lords) sure that opinion in all controversies should be followed, which may do good, and can do no harm; and that is to be reprobated, which can do harm, and is not necessar towards the doing what is just. But so it is, that not to restore a Minor in such cases as these, may, and will necessarily destroy all Minors, who may be over-reached, and cannot be repon'd, because of such Oaths; whereas, such as contract with them, can suffer nothing by such reductions; for, either the Minors with whom they contract, are læs'd, and then they will not be restor'd, and therefore, such as contract with them cannot be prejudg'd: but if they can make it appear that they are prejudged, it will necessarily follow, that the Minor is not læs'd, and so the Contract will not be lyable to reduction; and thus these Oaths will infallibly prove to be either unnecessar, or unjust.

This Cause came not to a Debate.

Againſt Forfeitures in abſence.

XIV. PLEADING.

My Lord Chancellour,

WE have ſubjected to our conſideration, an Overture, which ought to be ſeconded by very convincing arguments, before we paſs it into a Law, ſeing it innovats a cuſtom, which is as old as our Kingdom, and older then our poſitive Laws. And cuſtomes, like men, may be thought to have had excellent conſtitutions, when they laſt long; and this Act, if paſt, ſeems to infer the greateſt hazard upon the two higheſt of our concerns, for ſuch are our Lives and Fortunes.

The old inviolable cuſtom of *Scotland* was, that no probation could be led againſt abſents, either in Treaſon, or any other Crime, in any Court, ſave the Parliament; but the only certification in all criminal Letters, was the being denunced Fugitives (or out-law'd as the Engliſh ſpeak) which cuſtom hath maintained it ſelf for many hundreds of years, by its own reaſonableneſſe, without the neceſſity of being fenced with any other Authority: and albeit the Parliament did reſerve to themſelves, a liberty to proceed againſt Traitours, in caſe of abſence, yet they never granted that to any other Court; where-

whereby it clearly appears, that our Predeceſſors have thought that power incommunicable to all ſuch as were not Legiſlators, that procedure being rather a priviledged tranſgreſſion, then an execution of the Law. But it is now craved by this Act, that in caſe of perduellion, and riſing in Armes againſt the Prince, it ſhall be lawfull to the Juſtices to lead probation againſt abſents, and forfeit them accordingly; which ſeems to me moſt inconvenient, for theſe reaſons. 1. Becauſe the Stiles in all Courts are equivalent to fundamentals, and by an expreſſe Act of Parliament with us, Stiles are not to be altered: But ſo it is, there is no Stile in the Juſtice Court, bearing any other certification againſt abſents, but the being denunced Fugitives. 2. There was never any Inſtances of it ſince the foundation of the Juſtice Court, and a negative Practique being ſo old and uniform as this, is moſt binding, eſpecially where all the conveniences, reaſons and advantages which are now preſt, were then obvious; our Predeceſſors were ſure as Loyal as we, and let us not be more cruel then they were. 3. The old cuſtom was founded upon moſt convincing reaſons; for when perſons are proceeded againſt in abſence, they want the benefit of *exculpation*, for proving thoſe juſt defences which are of ſo great conſequence to them, and their poſterity; ſuch as are, That though they were preſent upon the place, yet they were taken priſoners, and carried there, and were only going looſe upon parroll, or fell accidentally amongſt thoſe Rebells, who had gathered themſelves together, or went there by a command from ſome of His Majeſties Officers, for reclaiming thoſe who were in Armes, with many other defences which (the party being abſent) none can know, and though known, none dare propone, it being a maxime in our Law, that none dare propone any thing to defend one, who being purſued for Treaſon is abſent. Another great diſadvantage, under which theſe will fall who are purſued in abſence, will be, that ſuch witneſſes may be received againſt them, as are lyable

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to just exceptions, and whom they would decline, if they were present; which objections likewayes, none know, nor dare propone; and it is likewayes very well known, that there are many witnesses, who will depone upon suggestion, very many things which they durst not assert, if they were confronted with the party against whom they were to depone, being sometimes overawed, and sometimes through pitty driven to speak only truth, when they look upon his countenance who is to live, or die by their depositions. Upon which accompt, confrontation of witnesses and parties hath, in the civil Law, been used as a successful remedy, and in ours the witnesses are ordain'd to look upon the pannells face when they depone. And albeit it may seem, that there is little hazard of a probation, where the case is so notour, as that of rising in Armes; yet, the mistake lyes in this, that though the rising in Armes be notour, it may be it is not notour who were present, and the persons may be doubtfull, though not the thing it self. A third great inconvenience is, that whereas those who are present may by interrogators, restrict, or explain, what seem'd disadvantageous in the deposition of such as depone against them, they will by this innovation, forfeit this advantage amongst other losses. 4. No other Nation receives concluding probation against absents; many instances whereof might be given, but I shall satisfie my self with that of *Freisland*, cited by *Sand. lib.* 5. *def.* 2. *Praxis nostra habet ut Criminosus si fugae se subtraxerit, ad instantiam procuratoris generalis citetur, & si praefixa die non comparet, fiducialiter bona in contumaciae paenam annotantur*: which is exactly our custom; and by the civil Law, *Tantum annotabantur bona rei non comparentis, ita ut si post annum venerit, & satis dederit de standojuri, ea recuperat si non, bona perdit non tamen de delicto habetur pro confesso, l.* 1. *& gloss. l. pen. & fin. ff. de requiren. reis.* which Title begins thus, *Divi-fratres rescripserunt ne quis absens puniatur, & hoc jure utimur, ne absentes damnentur.* And *Hottoman* tells us, that *Majestatis*

crimen

crimen in foro apud ſuum prætorem, perduellio vero à populo Romano comitiis centuriatis in campo martis judicabatur; which was much more reaſonable, then our preſent overture, ſeing the greater the crime is, it ſhould be the more ſolemnly, and ſlowly judg'd: from which procedure of the Romans in Perduellion, it ſeems our old practique of judging only abſents in the matter of Treaſon by a Parliament hath taken its origine, for *Comitia centuria* was to them, what a Parliament is to us. I might here likewayes, alledge the authority of *Matheus*, the Learnedſt Civilian who ever wrote upon that ſubject, *tit. 2. num. 6.* whoſe words are, *Denique cum leges vetant abſentem damnari, crimen perduellionis non excipiunt erit igitur & hic obſervandum, quod in aliis criminibus, ut abſens requirendus adnotetur, & bona obſignentur, publicentur denique, ſi intra annum non reſponderit.* L. abſentem, 5. C. de pœnis. l. abſentem. 6. C. de accuſat. l. ult. D. de requir. vel abſ. damn. *Nam quanquam Perduellio graviſsimum crimen eſt, videndum tamen ne in occaſionem ſevitiæ atque calumniæ habeatur*; *& pag. 371. dicit* Math. *Falſum eſſe abſentem in hoc crimine poſſe damnari, nec ullo juris loco excipi crimen Majeſtatis. Dicitque ſupradictam extravagantem Conſtitutionem, nullam authoritatem obtinere apud interpretes juris civilis.* 5. By the 90. Act. Parl. 11. *Ja. 6.* It is moſt juſtly ſtatute, that all the probation ſhould be led in preſence of the Pannal, and the Aſſyze, which ſhowes clearly, that our Law hath been alwayes jealous of probation led in abſence, and that probation is only to be led in preſence.

This innovation is recommended to us upon theſe reaſons; 1. That theſe who are contumacious, and flee from juſtice, ſhould be in no better condition then thoſe who appear, and they cannot complain of any of the foreſaid diſadvantages, ſeing theſe are occaſioned by their own abſence and fault. To which it is anſwered, that a perſon who is purſued for Treaſon may be abſent, not upon the accompt of any guilt, but becauſe the citation never came to his knowledge; as if he be at the time abroad

abroad in Forraign Countryes, where citations at the Mercat-croſſe of *Edinburgh*, and Peer and ſhore of *Leith* (which is all our Law allowes) ſeldom reach; and ſometimes the perſons ſumnioned, may be either ſick, or in priſon, and not be able to appear, or being lyable to other accuſations, or fearing rather the preſent influence of ſome enemies, then their own guilt, dare not. For though Treaſon, as the moſt comprehenſive of all other crimes to us, be of all others moſt abominated, when proven; yet, of all other crimes, moſt Innocents are, by either malice or deſign ofteſt enſnared, upon pretext rather, then by the guilt of Treaſon. For, as *Lipſius* obſerves of the times wherein *Tacitus* wrote, *Frequentata tunc temporis accuſationes majeſtatis, unicum crimen eorum qui crimine vacabant. Tertullian* in his apol. ſayes, *non licere indefenſos omnino damnari, & à* Carolo Magno *inſtitutu eſt, lib. 7. cap.* 145. *Ne quis abſens in cauſa capitali damnetur. Plutarch* in *Alcibiades* life, makes *Alcibiades* to have given this prudent anſwer, to one who challenged him for not appearing to defend himſelf, *Cetera (inquit) omnia libenter, ſed de capite meo, ne matri quidem, ne forte is, pro albo atrum calculum imprudenter injiciat.* Notat. *&* Liberius *Pontifex Romanus Conſtantio Imperatori, Judicem non poſſe, abſente reo, de crimine ejus judicare, niſi aut iniquus Judex ſit, aut privato odio ſævit. Hiſt. tripart. l. 5. cap. 16. Seneca* ſaith, *lib. 6. de Beneficiis, cap. 38. Quantum exiſtimes tormentum, etiamſi ſervatus fuero trepidaſſe, etiamſi abſolutus fuero, cauſam dixiſſe.* And as *Cicero* very well obſerves, theſe who are accuſed before any Judge for life, conſider oftner what that Judge may do, then what in juſtice he ought to do, *Oratione pro Quintio.* And thus we find, that *Athanaſius* and *Chryſoſtom* would not appear at Councils, to which they were cited, albeit they feared their Judges more then their guilt, *Niceph. lib. 8. c. 49.* It were therefore very hard in any of theſe caſes, to forfeit an abſent of his Property, ſeing in theſe, innocence and abſence are very compatible. Nor doth His Majeſty

Majeſty ſuffer great loſſe by this, as is urged; for if he who is purſued for Treaſon compear not, he is denunced Fugitive, and by that denunciation, His Majeſty poſſeſſes his whole Eſtate, till he die, or compear; and after death, he may be forfeit.

The ſecond Argument is, by the 69. Act. Par. 6. Fa. 5. Traitours may be forfeit after their death, in which caſe they are abſent, and want all the advantages above related. But to this the anſwer is, that the Law is ſo juſt, and merciſull, that after a perſon is denunced Fugitive in the caſe of Treaſon, it allowes him all the dayes of his life to purge his contumacy, by appearing to reclaim his innocence; and it never diſpaires of the one, till the other be elapſed: and when it proceeds againſt any man to forfeiture after his death, it ordains the neareſt of Kin to be called to exculpat him, by proponing defences, or objections againſt the witneſſes, and for doing every thing els which is uſual in ſuch caſes, or which might have been done by the Defunct himſelf, whereas he who is purſued in his own lifetime, cannot defend after that manner, as ſaid is. After death likewayes, death it ſelf, which is the greateſt half of the puniſhment, is over, and there is not ſo great hazard, as there is in his caſe, who is forfeit dureing life, who is by that Sentence (without any poſſibility of hearing) execute immediatly upon his being apprehended. After death alſo, malice, and deſign ordinarily ceaſes, ſo that the errors or prejudices of either purſuer or witneſſe are not ſo much to be feared.

The third Argument is, that probation may periſh in the mean time, if it cannot be received till after death. To which it is anſwered, 1. That this Argument, *aut nihil, aut nimium probat*; for, upon this account, Purſutes ſhould be ſuſtain'd for all other abſents, this prejudice being common to all: But, 2. It is ſafer, that a juſt probation ſhould periſh, then that a ſuſpected one ſhould be received; and this one inconvenience ſhould not weigh down the many, which are laid in the ballance of the other ſide. Parliaments are ordinar, and neceſſary after

publick Rebellions, wherein that horrid Crime may receive its legal, as well as its juſt puniſhment; or if they meet not, this may be otherwayes remedied; for, probation may be led *ad futuram rei memoriam*, though the party be abſent, reſerving to him all his other defences, by which the Kings right may be preſerved, and the Lieges rights not prejudged, and of all probations, that can leaſt periſh, which is to be led in the caſe of publick riſing in Armes.

The fourth Argument is, that the civil Law admits forfeiture in abſence, in the caſe of Perduellion (for ſo the common Law names that kind of Treaſon which is committed againſt the Prince, or State) and our Criminal Law being founded upon the Civil Law, ought in this, as in moſt other caſes, to be squared by it. To which my anſwer is, that there is no warrand for that aſſertion from the Law of the Romans; for, by that Law, *bona tantum annotabantur*, as hath been ſaid, in place whereof, *banna hodie locum obtinent*, which is equivalent to our Denunciations. But becauſe citations of the Civil Law, would reſemble pedantry too much, I ſhall recommend to ſuch as doubt this, the 16. *verſe*, 25. *Chap.* of the *Acts*, where *Feſtus*, a great Roman Lawyer, ſure, (as all their Preſidents of the Provinces were) tells us, *That it is not the manner of the Romans to deliver any man to die, before he who is the accuſed, have the accuſer face to face, and be heard to defend himſelf concerning the crime laid againſt him.* I confeſſe, that forfeiture in abſence is allowed *per extravag. Henrici ſeptimi* (and it is well called an extravagant Conſtitution) but that is accompted no part of the civil Law; and if we follow its model, we ought to allow forfeiture in abſence in all points of Treaſon, as this doth; and even that Conſtitution acknowledges, that this was not allowed by the Romans, and if it had, this Conſtitution had been unneceſſar, as it is now unreaſonable. And I remember, that *App. Alex.* in his third Book of the civil Warrs, relates an eloquent Harrangue made by *Lucius Piſo*, in favous of

Antonius,

Antonius, maintaining, that no perſon who is abſent could be condemned, though upon probation, which was accordingly found by the Roman Senate. And though our Parliaments uſe to proceed againſt abſents, in caſe of Treaſon; yet, that is ſo ſeldom, and ſolemnly done, that there is little hazard to the Pannals, and every man hath ſtill ſome friends in ſo great a number, who may defend him; nor is it probable that the Parliament, who are the great Curators of the Common-wealth, and who are ſo much entruſted by us, as to have repoſed upon them the Legiſlative Power, will prejudge any privat party; remembering it may be their caſe one day, which is now the Pannals: and that being a ſupream Court, is not ſtinted to follow a probation which is ſuſpect, though privat Aſſizers might, for fear of an Aſſize of error; which makes a vaſt difference and diſparity of reaſon.

Let us then (My Lord) conſult, the intereſt of our Poſterity, which is a generous kind of ſelf-defence: for the Italian proverb obſerves well, that it is better to live in Countries which are barren, then in Countries where there are rigid Laws. Let us guard againſt what is cruel, as we wiſh what is juſt; and let us lawfully be carefull now of theſe our Lives, and Fortunes, of which we have been too often unneceſſarily anxious. God himſelf would not condemne *Adam*, till he heard him, and though he knew the ſins of *Sodom*, and *Gomorrah*, he would not pronunce ſentence againſt them, till he went down and ſaw their abominations. Let us not then make ſnares in place of Laws, and whileſt we ſtudy only to puniſh ſuch as are Traitors, let us not hazard the Innocence of ſuch as are Loyal Subjects.

The learned reaſons adduc'd for this Overture, and the opinion of the Seſsion, prevail'd againſt this Diſcourſe; and the Parliament did ordain, that abſents might be proceeded againſt in the Juſtice-court, for publick riſing in Armes.

For the late Marquess of *Argyl*, immediatly before his Case was advised.

XV. PLEADING.

Whether passive complyance in publick Rebellions, be punishable as Treason.

My Lord Chancellor,

I Wish it may be the last misfortune of my Noble Client, that he should be now abandoned to the patronage of so weak a Pleader as I am, whose unripeness both in years and experience, may, and will take from me that confidence, and from your Lordships that respect, which were requisit in an Affair of this import. In our former Debate, which is now closed, we contended from the principles of strict and municipal Law: but here I shall endeavour to perswade your Lordships, from the principles of equity, reason, conveniency and the custom of Nations; which is the more proper way of Debate before a Parliament, who make Laws, but are not tyed by them, and who in making Laws, consider what is fit and equitable, and then ordain what shall be Law and Justice; and if your Lordships consider strict Law in this case, it were in vain for the loyalest Subjects, who liv'd in these three Kingdoms during those late confusions and rebellions, to defend his

his own actions by that rule: for, since intercommuning with Traitors, concealing of Treason, and acknowledging their Authority, are by strict Law, in regular times, undenyable Acts of Treason, I am no more to debate abstractly my Clients Innocence as to these, for who amongst us did not share in that guilt? All did pay Sesse, all did raise Summonds in the Protectors name, we were all forc'd to be the idle witnesses of their Treasons, and therefore, I shall only contend, that in such irregular times as these were, wherein Law it self was baniſht with our Prince, meer compliance can amount to no crime in him, and that as to this he lyes under no singular guilt; Especially, seing His Majesty has, by a Letter under His Royal Hand, declar'd, that he will not have His Advocat insist against him, for what was done by him, or any els, preceeding the year, 1651. (in which time he was only an eminent Actor) having retired himself from all publick imployments under *Cromwels* Usurpation, being known for nothing all that time, but a sufferer, and being forc'd by self preservation to do those things for which he is now accused, which being undenyably acknowledged by all the Nation, cannot but recommend these few particulars, which I am now to offer for him.

Complyance (as the very word imports) is only a passive connivance, *Et præsupponit crimen in suo esse hactenus constitutum*; and in Law, when a multitude offend (as in our case) the contrivers, and such as were most active, are, and should only be punish'd, *detrahendum est severitati ubi multorum hominum fragos jacet*: and therefore, this Noble Person being acknowledged to be none of the first plotters, nor having been singular amongst that vast multitude of complyers, cannot be brought in amongst such as ought to be punished. For, albeit where many may commit a crime, there the multitude of offenders should lighten the punishment; yet, where the crime is already commited collectively by a multitude, there the number of offenders

offenders takes off the guilt, and in ſuch caſes, none ſhould be puniſhed (ſaith *Aſlictus*) but *in flagranti & recenti crimine* (or with rid hand, as our Law terms it) *dum durat crimen, nec ſine quorundam nece extingui poteſt ſeditio*, or where the renewing of the crime is juſtly to be feared; for puniſhments being of their own nature inflicted, not for what is paſt (ſeing that cannot be remeeded) but for example in the future, certainly where the rebellion is extinguiſhed, and needs no more be feared, as in our caſe, (God be praiſed) it were cruelty to puniſh ordinar complyers. It is remarkable, that in the 13. 14. 15. Acts of the 5. Parliament of Queen *Mary*, ſuch Scots-men as did ride with Engliſh-men, even where her Majeſties Authority ſtood in its integrity, are ordain'd only to be lyable for what skaith they did to Scots-men who ſerved the Country, and that they being charged, to leave aſſurance with Engliſh-men, and diſobeying, ſhould have no action againg true Scots-men for any wrong done to them.

If then ſuch lenity was us'd, and ſuch commiſeration extended, to ſuch as were involved in a publick oppoſition to lawfull and ſtanding Authority, and in a compliance with the Engliſh, who were at that time, born and ſworn enemies both to this Crown, and Countrey; what may ſuch expect as complyed only when no viſible Authority was able to protect ſuch, who were forc'd to comply, not out of any deſign to defend Uſurpation, but rather out of a deſign to preſerve themſelves for doing His Majeſty furder ſervice? And as in the Body-natural, the ordinar rules of Phyſick take no place, when there is a violent and univerſal conflagration of Humors; ſo the ordinar rules of Law ſhould have as little place in the Body-politick, when a whole Nation have run themſelves head-long into a common diſtraction. To which purpoſe I cannot but repreſent to your Lordſhip, that excellent Law, made in the Reign of *Henry* the ſeventh of *England*, and with conſent of that excellent Prince, wherein it was enacted, That no Subject ſhould

be

be guilty of Treaſon, for obeying one who was called King, though known to be an Uſurper, becauſe the people do there not rebell, but ſubmit.

Neceſsity may likewiſe be adduc'd for extenuating this complyance, which is therefore ſaid to have no Law, becauſe it is puniſhed by none; without complying at that time, no man could entertain his dear Wife, or ſweet Children, this only kept men from ſtarving, by it only men could preſerve their ancient Eſtates, and ſatisfie their Debts, which in honour and conſcience they were bound to pay, and without it, ſo eminent a Perſon as the Marqueſs of *Argyl*, and ſo much eyed by theſe rebells, could not otherwiſe ſecure his life againſt the ſnares were dayly laid for it; and ſo this complyance did in effect reſolve in a ſelf-defence, which *inculpata tutela*, ſeing it can exempt a man from murder, and theſe other crimes that are contrair to the Law of Nature, it ſhould much more defend againſt the crime of Treaſon, which is only puniſhed, becauſe it is deſtructive to the government of our Superiours, and Statutes of our Country; and ſince crimes are only puniſhable, becauſe they deſtroy Society and Commerce, how can this complyance be puniſhed, which was neceſſar for both theſe?

Mans will is naturally ſo frail, and man becauſe of that frailty ſo miſerable a creature, that to puniſh even where his will is ſtraight, were to add affliction to the afflicted, the want of this will defend mad men againſt paricide, and the degrees of this diſtinguiſheth ſlaughter from murder; and in the Acts of Parliament whereupon the Lybel as to compliance is founded, it is requiſite, that the compliance be voluntar, thus in the 37 Act, 2. Parliament, *Ja.* 1. It is ſtatute, that no man willfully receipt Rebels, and by the 205. Act, 14. Par. *Ja.* 6. theſe who apprehend not ſuch as miſ-repreſent the King, are as guilty as the Leaſing-makers, *if it be in their power to apprehend them*, as the Act very well adds. Likeas, by the 144. Act, 12. Par. *Ja.* 6. The Lieges are only Prohibited to intercommune with ſuch Traitors

tors as they might crub; for that Act, as it forbids all Commerce with Rebels, So it commands all the Subjects to advertise His *Majesty* of their Residence, and to apprehend them; whereby it is clear, that this last Act is only to have Vigour, when the Authority of the Soveraign stands in force, *& per argumentum à contrario sensu*, seems to excuse such as submit to Traitors, when there is either nothing to be advertised, or when Advertisments of that nature, are either impresstable, or at least unprofitable, as in our late troubles, at which time, the residence of these Rebels was notour, and all correspondence betwixt the *King* and His People, was daily betrayed and intercepted. Consonant to which, is that excellent Law, *l. 2. ff. de Receptatoribus*, where it is said, that *Ideo puniuntur receptatores, quia cum apprehendere potuerunt dimiserunt*: and Bald. *ad* l. *delictis*, ff. *de noxal. act.* is most expresse, that *receptans rebelles, non voluntarie, sed coacte, quia sunt plures rebelles simul: & eos expellere non potest sine suo periculo, non punitur aliqua pœna.* Thus likewise in the Statutes of King *William, cap.7* §. 2. it is said, *Pro posse suo malefactores ad justitiam adducent, & pro posse suo Justitiarios terræ manu tenebunt.* And §.5. it is ordain'd, *Quod magistratus pro posse suo auxiliantes erunt domino regi ad inquirendum malefactores, & ad vindictam de illis capiendam.* By all which it is clear, that not only should complyance be voluntar before it be criminal, but that likewise it must be a complyance against lawfull Authority, able to protect such as revolt from it. I remember in *anno, 1635. James Gordoun* being challenged for corresponding with *Alexander Leith*, and *Nathaniel Gordoun*, declared Traitors for burning the House of *Frendraught*, they were assoylzied, because the intercommuning challenged was not lybell'd to have been voluntar, and thereafter the Assize who assoilzied them, having been pursued for wilfull error for absolving as said is, they were likewise absolved from that Process of error, in the which Process, that same argument was urg'd, but not so strong in point of fact as in our case;

and

and becauſe the deſign is that which differences the actions of men (*propoſitum crimina diſtinguit*) and ſeing deſigns being the hid acts of the mind, are only gueſſed at by the concomitant and exterior circumſtances, I ſhall only intreat your Lordſhip to conſider theſe few preſumptions, which being joyned, may in my apprehenſion, vindicat this Noble Perſon from the deſign of voluntar complyance. 1. He is deſcended from a ſtock of of Predeceſſors, whoſe blood hath preſcribed by an immemorial poſſeſſion, the title of eminent Loyalty, and that ſame Law which preſumes, that the blood and poſterity of Traitors is infected with a deſire to revenge the juſt death of their Predeceſſors, and an inclination to propagate their crimes, doth likewiſe preſume Loyalty and a deſire to be thankfull, in the the children of ſuch as have received great favours, and performed great ſervices, to ſuch as have been the Benefactors. 2. Theſe with whom he is ſaid to comply, were known and avowed enemies to Nobility, had quite exterminated in *England*, and begun to exterminat in *Scotland*, all memory of Nobility, and badges of Honour; ſo that in this complyance, he muſt be thought to have plotted againſt his own intereſt: nor can I ſee what advantage he could expect from a Common-weath, which valued, nor preferr'd none but Souldiers, a Trade, which ſuited neither with his breeding, nor years. 3. They were enemies to Presbyterian Government, of which he has alwayes ſhewed himſelf ſo tenacious, and of all Governments they did moſt abominat that one, for which he had expoſed himſelf to ſo many hazards. 4. That Uſurper had never oblieged him neither by reward, nor complement. 5. He was ſworn their enemy both in Parliament and Councel, and charity as well as Law, preſumes againſt perjury. 6. He was purſued by them moſt unjuſtly, both at Councel of War, and elſewhere, and was known to have been hated extreamly by their Commander in chief, for complyance with whom he is now challenged: By all which it is moſt improbable, that his Lordſhip would have

linked himself with that abominable crew of miscreants, by whom he might losse much, but gain nothing.

His *Majesty* hath recommended this case to be judg'd by your Lordships, whom He knew the iniquity of these times did (though without any cordial assent) involve in the same guilt, and albeit it were a guilt, there will be hardly any found to cast the first Stone at him; and His *Majesty* hath not delivered him up to be proceeded against, till by His Act of Indempnity (granted even to such as were eminently engaged in the contrivance and execution of the most horrid plots, that were perpetrat against him) He had first cast a copy to your Lordships of that meek procedure which he allowes, and not till he had (even notwithstanding of their compliance) preferr'd some to be Councellours, some to Titles of Honour, and many to employments of great Trust. And were it not unjust, that he should suffer for acts of Frailty, when the Ring-leaders, and malicious plotters pass unpunished? And were it not unkindness to our Countrey, to have it thought that we had Subjects who deserved worse, then *Lambert*, *Lintil*, and others? I shall to all this add, that the guilt charg'd upon this Noble Person, is such as was thought prudence in those who were most Loyal, and this complyance was so customary, and so universal, that it was thought no more a Crime, then the living in *Scotland* was Criminal: whereas in Law, *qui sequitur communem errorem, non delinquit, & consuetudo facit actum de sua natura punibilem impunibilem, & excusat à pœna ordinaria, & extraordinaria, Farin. Quæst.* 85. *de pen. temperandis*. Custom is a second Nature, and example a second Law, and he who obeys them, obeys *quasi legem naturæ, & patriæ*: and in all civil Wars and uproars, especially where such have lasted for a considerable time, as in *Portugal*, *France*, *Germany*, *&c.* none have been punished for mingling with the multitude, if they did not pervert them. And if we consult the Ancients, when justice and equity were not yet oppresst by interest, and design, we will find, that *Julian* the Emperor having only punished the chief rebells,

rebells, *reſidui omnes abierunt innoxii, quos in certaminum rabiem neceſsitas egerat, non voluntas.* And *Themiſtius* praiſes *Valens* the Emperor, becauſe *non pœna dignos exiſtimavit, qui bellum non ſuaserunt, ſed qui abrepti ſunt à morum impetu, & qui ſuccubuerunt ei qui jam rerum potiri videbatur.* And *Joſeph. lib.* 5. tells us, that in ſuch univerſal rebellions, *Titus* uſed only to puniſh the ring-leaders, *unum criminis ducem puniebat reipſa, multitudinem vero, ſola verborum increpatione, ſeditionum concitatores, & duces factionum dicuntur,* l. 16. ff. *quando appell.*

It is likewiſe univerſally received by the Law of Nations, that ſuch as ſubmit after univerſal rebellions, either upon conditions, or who put themſelves in the mercy of their Magiſtrats, (as *Grotius* doth moſt wiſely obſerve, *lib.* 3. *cap.* 11.) are ſtill ſecure, and therefore, ſince the Marqueſs did immediatly upon His Majeſties return, go to Court, to attend His Majeſty amongſt his other loyal Subjects, judging from the dictats of his own conſcience, that he was in the ſame caſe with your Lordſhips his preſent Judges, it were ſtrange that he ſhould fall, when others are in great multitudes pardoned, who fled out of a conſciouſneſs to their own guilt, eſpecially ſince he offered to prove, that he teſtified to many hundreds during His Majeſties abſence, a deep ſenſe of that misfortune, and an abſolute averſion from that preſent Uſurpation; and that he aſſiſted His Majeſties friends, both with money and advice: And who would think, that in equity he ought to dye, by theſe whom he wiſh'd reſtor'd, and for which reſtoration, he prayed daily in his Family; and die for complying with thoſe, whoſe ruine he beg'd daily upon his knees? And though he did not joyn with ſome who were Commiſſionated by His Majeſty, yet that proceeded not in him, more then in others, from any unkindneſſe to the Cauſe which he alwayes allowed, as can be prov'd both by themſelves and others, but from a perſwaſion he had, that ſuch courſes as they took, would ruine the deſign which was propoſed; and

any thing he did in opposition to them, was to defend himself and his poor Countrey, against injuries, which were designed against him upon privat quarrels, as he still offered to prove. If we consider that same interest of Nations, for which Treason is punishable, we will find it unfit to punish ordinar complyers after a tumult is quieted; for if every man that were involv'd in the guilt, did think that he were punishable, all would be forc'd pertinaciously to continue the rebellion they had begun, and to expect from successe only, that impunity which the Law denyed: and thus your Lordships should make all future rebellions to be both cruel, and perpetual.

I come now to the Probation adduced by His Majesties Advocat, for proving this compliance, and in order thereto, I shall lay before your Lordships these following considerations; 1. That the weaker the Relevancy is, the Probation should be proportionably the stronger, *gravatus in uno, levandus in alio.* 2. That in Criminals, Probation should be very convincing. 3. The more illustrious the Pannel is, the proof should be so much the more pungent, because the Law presumes Noble Persons less inclin'd to commit Crimes then others. 4. Where there is no penury of Witnesses, probation should be so much the clearer, because the Law presumes that all is known, which can be known: but so it is in this case, sixty Witnesses have been led (albeit our Law allowes only 25 in Criminals) and a long time hath been taken, and many invitations given to all persons, in all corners, to come and depone, and it is believed by most of these silly persons, that it will be most acceptable to His Majesty, and may procure a reward to themselves, that they depone against his Lordship; which remembers me of these slaves in *Juvenal*, who at *Sejanus* fall, invited one another to offer Indignities to his dead body, *Dum jacet in ripa calcemus Cæsaris hostem.* 5. The Law requires in these attrocious Crimes, witnesses *omni exceptioni majores*, and these are in Law expon'd to be such as the jea-

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louſie of the greateſt enemy needs not ſuſpect; whereas moſt of all the Witneſſes adduced, are either the ſervants of ſuch as have been debarred themſelves from witneſſing, for fear of partiality, or the Uſurpers Souldiers, who have ſo oft foreſworn ſolemnly their alledgeance to their Prince, that no Judge can rely upon their depoſitions; for it is preſumable, that *ſemel perjurus*, will be *ſemper perjurus*: and albeit His Majeſty, by His Indempnity, hath vail'd their Crimes, yet He hath not taken them away, as is clear, *per* l. *ffin.* C. *de generali abolitione*; the excellent words run thus, *Indulgentia (Patres conſcripti) quos liberat, notat, nec infamiam criminis tollit, ſed pœnæ gratiam facit*; whence I argue, that infamous perſons cannot be Witneſſes, but ſo it is, that perjured perſons (*non abſtante amneſtia & remiſſione*) are infamous by the foreſaid Law; the Criminal Regiſters likewiſe tells us, that one who had been condemned for forging of falſe Writes, was refuſed to be received as a Witneſs in *Frendraughts* Proceſs, albeit he had obtained a Remiſſion; and certainly, Perjury in the crime of Treaſon (whereof theſe Soudiers are guilty) is a more odious Crime, then that of forging of falſe Writes. 6. I hope your Lordſhips will conſider, that moſt of what theſe Witneſſes have deponed, are Speeches, which the beſt of men may have forgot, after ſo long a time, and in a time when both men and manners have been much confounded, by the ſtrangeneſs and number of interveening accidents: moſt of theſe Witneſſes have deponed upon that which fell under ſenſe, and ſo have acted rather the parts of Judges, then Witneſſes. Thus ſome depones, that the Marqueſs's Boats did bring the Engliſh up *Lochfine*, and that they could not have got up without his aſſiſtance, which laſt part, as it is negative, ſo is an act of the judgement, and not the object of any exterior ſenſe, and they preſume they had an order from the Marqueſs, becauſe elſe they durſt not have gone, and is not this to imagine, and not to depone? 7. Moſt of them are perſons, whom the Dittay acknowledged to have

have been wronged by the Marqueſs, moſt of theſe poor perſons who have deponed, were to my certain knowledge, ſo confounded by appearing before a Parliament, and by interrogators, that they ſcarce knew what to anſwer. 8. Not any two of theſe numerous Witneſſes concurr in their depoſitions, all vary, and moſt do claſh, and are either *Vaccillantes*, or *Singulares*; neither can the depoſition of one Witneſſe, as to one particular circumſtance of a Crime, and the depoſition of another as to another, be joyn'd for making up a clear Probation, for there the Judge is certified of neither of theſe circumſtances, ſeeing one Witneſs is none, whereas proving witneſſes ſhould be *conteſtes*; and if a Pannel were accuſed of moe Crimes in one Lybel, the depoſition of one Witneſs to prove one, and of another to prove another of theſe Crimes, would not prove the Lybel; ſo neither can the ſingular depoſition of two witneſſes upon different points, prove one crime. Such ſpelling is not lawfull in probation, and this is that which the Doctors call *ſingularitas diverſificativa*, which in Law hinders conjunction *in probationibus*, as well as *ſingularitas obſtitativa*, *Alexand. conſil.* 13. *Hippol. in ſua praxi*, §. *diligenter num.* 149. *Farin. tract. de oppoſ. contradicta. teſtium.* 9. The Law makes a difference, as to the probation betwixt Perduellion, or open Treaſon, in which they require moſt convincing probation, and in conſpiracies or occult crimes, in which the rigour of probation is remitted, becauſe the poſſibility of proving is much reſtricted, in reſpect of the clandeſtineſſe wherewith ſuch Conſpirations are managed; and therefore, ſeing in this caſe the acts to be prov'd were committed publickly, ſuch as joyning in open hoſtility with the Uſurpers, aſſiſting at their Proclamations, levying Forces againſt His Majeſties Generals; Certainly the probation ſhould be moſt illative of what is alledged, and the provers ſhould be *omni exceptione majores*. I muſt tell you my Lords, that ſome have been ſo

unjuſt

unjuſt to you, as to fear, that though the probation be not concluding, that yet ye will believe, to the great diſadvantage of my Noble Client, the unſure depoſition of that as ſoul, as wyde-mouthed witneſſe, *publick brute and common fame*, which as it is more unſtable then water, ſo like water it repreſents the ſtraighteſt objects as crooked to our ſenſe; and that others of you retain ſtill ſome of the old prejudices which our civil and inteſtine diſcords, did raiſe in you againſt him, during theſe late troubles: but I hope, generoſity and conſcience will eaſily reſtrain ſuch unwarrantable principles, in perſons who are by Birth, or Election, worthy to be ſupream Judges of the Kingdom of *Scotland*. It is unmanly to deſtroy your enemy unarmed, but unchriſtian when you repreſent God as Judges; for then you endeavour to make him a murderer; and in my judgment, he revenges himſelf but meanly, who to ruine his enemy, deſtroyes his own Soul, and taſhes his Honour.

My Lords, as Law oblieges you to abſolve this noble Perſon, ſo your intereſt ſhould perſwade you to it. What is now intented againſt him, may be intended againſt you; and your Sentence will make that a crime in all complyers, which was before but an error and a frailty; your Royal Maſter may with our Saviour then ſay to you, *Thou cruel ſervant, I will condemn thee out of thine own mouth:* Or, if your Lordſhips be pardon'd, he may ſay to you as his Maſter ſaid to the other, *Sure I did pardon thee, why waſt thou ſo cruel to thy fellow ſervant?* But, not only may this prove a ſnare to your Lordſhips, but to your Poſterity. Who in this Kingdom can ſleep ſecurely this night, if this Noble Perſon be condemned for a complyance, ſince the Act of Indempnity is not yet paſt? And albeit His Majeſties clemency be unparallel'd, yet it is hard to have our Lives hung at a *may-be*, and whilſt we have a Sentence-condemnator ſtanding againſt us. *Phalaris* was burnt in his own Bull: and it is remarkable, that he who firſt brought in the *Maiden*, did himſelf ſuffer by it.

I do therefore humbly beg, that since this Proceſs was intented upon Informations given to His Majeſty, of the Marqueſs's being very extraordinarily active for the Uſurpers, that your Lordſhips would tranſmit the Proceſs as it now ſtands to His Majeſty, that thereby he may have a fair occaſion to give a generous teſtimony of his clemency, that the people may be ſecured againſt all jealouſies and fears, and that your Lordſhips may be reſcued from ſo invidious a tryal.

For

For *Mævia*, accuſed of Witchcraft.

XVI. PLEADING.

I Am not of their opinion, who deny that there are Witches, though I think them not numerous; and though I believe that ſome are ſuffer'd by providence, to the end that the being of Spirits may not be deny'd; Yet I cannot think, that our Saviour, who came to diſpoſſeſſe the devil, who wrought moe Miracles in his own time, upon poſſeſt perſons, then upon any elſe, at whoſe firſt appearances the oracles grew dumb, and all the devils forſook their temples; and who promiſed, *John* 12. that the Princes of this World was now to be cast out, would yet ſuffer him to reign like a Soveraign, as our fabulous repreſentations would now perſwade us.

This perſon for whom I appear, ſtands endicted as a Witch, upon ſeveral Articles, the firſt whereof is, that ſhe did lay on a Diſeaſe upon *A. B.* by uſing a Charm. 2. That ſhe took it off by another. 3. That it is deponed by two penitent Witches, that ſhe and they did flee as Doves to the meeting place of Witches.

As to the impoſing or taking off diſeaſes by Charmes, I conceive it is undenyable, that there are many diſeaſes whereof the Cures, as well as the Cauſes, are unknown to us; Nature is very ſubtile in its operations, and we very ignorant in our inquiries; from the conjunction of which two, ariſes the many errors and miſtakes, we commit in our reflections upon the productions of nature: to differ then from one another, becauſe of theſe errors, is ſufferable, though to be regrated; but to kill one another, becauſe we cannot comprehend the reaſon of what each other do, is the effect of a terrible diſtraction; and if this were allow'd, the moſt Learned ſhould ſtill be in greateſt danger, becauſe they do oftimes find myſteries which aſtoniſh the ignorant; and this ſhould give occaſion to the Learned to forbear deep ſearches into natural myſteries, leſt they ſhould loſs their life in gaining knowledge, and to perſecute one another: for every Phyſitian or Mathematician, who is emulous of another, but cannot comprehend what his rival doth, would immediatly make him paſſe for a Wizard. It is natural for men to think that to be above the reach of Nature, which is above theirs. If this principle had taken place amongſt our predeceſſors, who durſt have us'd the Adamant? For certainly, nothing looks liker a Charm, or Spell, then to ſee a Stone draw Iron; and men are become now ſo wiſe, as to laugh at theſe who burnt a Biſhop, for alledging the World was round, ſo blind and cruel a thing is ignorance? And if this principle, of believing nothing whereof we do not ſee a cauſe, were admitted, we may come to doubt, whether the curing of the *Kings Evil* by the touch of a Monarch, may not be likewiſe called charming. This then being generally premiſed, to curb the over-forwardneſſe of mankind,

It is alledged, that the Lybel is not relevant, in ſo far as it is founded upon my Clients having threatned to do her neighbour an evil turn, that ſhe went in to her houſe, and whiſpered ſomething into her ear, whereupon ſhe immediatly diſtracted:

for,

ſor, though threatning, when miſchief followes, hath been too much laid weight upon by us, yet the Law hath required, that many particulars ſhould concurre, ere this be ſuſtained, as that the perſon who threatned did ordinarily uſe to threaten, and that miſchief conſtantly followed her threatnings, *minæ ejus quæ ſolita eſt minas exequi*, that theſe threatnings appeared rather to be the product of a ſettled revenge, then of a boiling and airie choller, which doth oftimes, eſpecially in women, occaſion very inconſiderat extravagancies. 2. It is required, that the threatnings were ſpecifick, as if ſhe had promiſed that ſhe ſhould cauſe her diſtract, and the diſtraction accordingly followed: but it were too lax, to aſcribe every accident to a general threatning, as is clear by *Dallrio, lib. 5. ſect. 3.* Lawyers likewiſe conſider, if the occaſion of the quarrel was ſo great, as might have provockt to ſo a cruel a revenge as that which was taken; whereas here the occaſion was very mean, not exceeding two pence. And though all theſe do concurre, yet *Farin. Quæſt. 5. num. 37.* acknowledges, that theſe are not ſufficient to infer the crime of Witchcraft, but only to load the perſon accuſed with a ſevere preſumption, or to infer an arbitrary puniſhment; and in the Proceſs againſt *Katharine Oſwald*, the 11. of *November*, 1629. thoſe threatnings, though the effect followed, were not found ſufficient to infer Witchcraft, but only to be puniſhable *tanquam crimen in ſuo genere*, that is to ſay, as an unallowable and ſcandalous kind of railing.

The ſecond defence againſt this Article is, that it is not relevant to Lybel, that the malefice was occaſioned by my Client, except it were condeſcended by what means it was occaſioned; for in Law, when I am ſaid to have pro luced any effect, there muſt be a neceſſary contingency ſhewed betwixt what I did, and what followed, for elſe, the very looking upon her might have been ſaid to have been a cauſe, and when ſickneſſes are alledged to have been occaſioned by Witches, the or-

dinar signs given, are, that the disease be in it self such as cannot be occasioned by nature, as the vomiting up of nailes, glasses, and other extraordinar things; that the person maleficiat do go in an instant, from one extremity to another; as from being extreamly weak, to be immediatly extreamly strong; or use extraordinar motions, which cannot be occasioned by Nature, as *D. Autum.* in his discourse of Witchcraft doth most learnedly observe. But so it is, that neither of those can be observed here; for distraction is a very natural disease, and has oftimes fallen upon a man in an instant, especially upon an excesse of fear; and who knows, but this Woman, who by her Sex and Humour, is known to be very fearfull, might have been so surprized at my Clients coming into her, after the threatning, that this excesse of fear might have thrown her into that distraction, under which she now labours; and yet my Client might have had no influence upon her as the cause, but as the occasion only of this her distemper.

All conclusions in criminal cases should be very clearly inferr'd, since the crime is so improbable, and the conclusion so severe. And therefore, Lawyers are of opinion, that if the inferences be not demonstrative, and undenyable, *conclusio semper debet sequi debiliorem partem*, that which but may be, may not be, and Lawyers do constantly conclude, that we must only conclude that in crimes to have been done, which could not but have been done. And who can say, that necessarily this was done by her here, which could not but occasion this Distaction, and therefore, *Perkins*, *cap. 6.* do's assert, that no malefice can be a sufficient ground to condemn a Witch, except she either confess, or that it be proven by two famous Witnesses, that she used means that might have produc'd that effect. And though where Charms and other means expresly discharg'd are used, these unlawful means are by the Judge repute, as if these means might have been effectual, *in odium illiciti*, and that the users have only themselves to blame in that case, who would use these Charms,

Charms, Spells, and Incantations, of which the Law is jealous: yet where none of these are used, but a simple whisper, the effect in that case cannot be said to have flow'd from it, nor do's any severe presumption lye against a thing that is ordinar. And *Bodin. lib.* 4. concludes, that *in capitali judicio ex præsumptionibus veneficas non esse condemnandas, ut si sagæ deprehendantur egredientes ex ovili cum ossibus, bufoinbus, vel alliis instrumentis magicis instructæ licet oves statim moriantur.* All conclusions must be necessar or presumptive; but so it is, that this conclusion is not necessar, since all these remedies might have been used, and yet the user might have been innocent: for, a necessar conclusion is *à qua veritas abesse non potest*; and if this inference be only presumptive, it is as undenyable, that Witchcraft cannot be inferr'd from such a presumptive conclusion, as is clear by *Farin. quæst.* 36. *num.* 11. *Perkins, Bodin.* and others above-cited: and if it were otherwise, Judges might condemn upon guessing or malice, and so moe would be in danger to die by injustice, then by Witchcraft; and may you not as well punish such as stay bleeding by applying a Stone, or who prevent abortions by girding the woman with a Belt, now much in fashon? And therefore it is very remarkable, that by the 73. Act, 9. Par. Queen *Mary*, Witchcraft, Sorcery, Negromancy, and sicklike arts for abusing the people, are only forbiden; nor can it be subsumed that any Art, or exterior thing, whereby people use to be abused, were here used, and therefore this Article connot be said to fall under the prohibition of the Act of Parliament.

The second Article is, that my Client did cure the said person whom she had formerly distracted, by applying a *Plantane* leaf to the left side of her head; and binding a Paper to her Wrest, upon which was write the name of *Jesus*. Which being done by her who was an ignorant person, being done to the person who formerly distracted upon her whisper, and the Cure being perfected in lesse time, then Nature uses to take for com-

compoſing ſuch gerneral and horrid diſtempers, might neceſſarily infer, that this Cure was performed by Witchcraft.

Againſt which Article, it is alledged, that the concluſion here ſhould demonſtrat, that neceſſarily this cure was performed by no natural cauſe, whereas the mean here uſed, *viz.* the applying of a Plantane leaf, is a natural thing, and may cure in a natural way, it being known that there is nothing ſo cold as a Plantane leaf, and ſo it might have been very fit for curing a diſtraction, which is the moſt malignant and burning of all feaveriſh diſtempers. Or who knows, but that this diſtraction having been occaſioned by the exceſſive fear ſhe had of my Clients revenge, but that how ſoon ſhe was reconciled to her, and that ſhe had by the ſame ſtrength of fancy which made her ſick, conceived that ſhe would likewiſe reſtore her againſt that ſickneſſe, her diſtraction might have abaited with her fear? 2. The Law-givers having puniſhed crimes, becauſe theſe crimes are deſtructive to their Subjects, and Common-wealth, have for the ſame reaſon only puniſhed ſuch indifferent inchantments, as did either kill men, or enſnare them to unlawfull luſts, but not thoſe Arts, where the health of man and the fruits of the ground were ſecured, againſt diſeaſes and tempeſts, as is clear, *Per l. 4. Cod. de Malef & Math. Eorum eſt ſcientia punienda, & ſeveriſsimis merito legibus vindicanda, qui magicis accincti artibus, aut contra hominum moliti ſalutem, aut pudicos ad libidinem delexiſſe animos detegentur, nullis vero criminationibus implicanda ſunt remedia, humanis queſita corporibus, aut aggreſtibus locis, ne Maturis vindemiis metuerentur imbres, aut ventis grandiniſque lapidatione quaterentur: innocenter adhibita ſuffragia, quibus unius cujuſque ſalus, aut exiſtimatio lederetur, ſed quorum proficerent actus, ne divina munera & labores hominum ſternerentur.* Which Law being a Statute made by *Conſtantine*, who was a Chriſtian Emperor, being conceived in ſo devote terms, and inſert by *Juſtinian*, who was a moſt Chriſtian Prince, amongſt his own Laws, cannot but be a

Law

Law very fit to be obſerved in a Chriſtian Common-wealth. And though it be allegded, that this Conſtitution was abrogat by *Leo, nov.* 65. yet, it is very remarkable, that this Conſtitution made by *Leo*, is not inſert in the Baſilicks, ſo that it ſeems it has been thereafter abrogated.

It is not probable, that the Devil, who is a conſtant enemy to mankind, would employ himſelf for their advantage; and the Name of *Jeſus* being uſed, ſo much reſpect ought to be had to it, that the uſer ſhould not be puniſhed with death, except it could be clearly proved otherwiſe, that ſhe had received this Charm from the Devil; in which caſe, the Author, and not the thing, occaſions the puniſhment, or elſe, if ſhe had been diſcharged by the Church, or any Judicatory, to uſe that Cure, as that which was in it ſelf dangerous; but to burn a poor ignorant woman, who knew not that to be evil which ſhe uſed, were to make ignorance become Witch-craft, and our ſelves more criminal, then the perſon we would condemn. And all theſe Laws and Citations which can be brought to prove, that magical Incantations are puniſhable by death, though imployed for the well-fare of mankind, muſt be interpret ſo, as to relate only to ſome of theſe unlawful caſes above related. And I admire, that thoſe who inveigh ſo much againſt this Conſtitution of *Conſtantine*, have never taken notice, that theſe Charms are only allowed, even for the wellfare of man and beaſt *ubi ſunt innocenter adhibita ſuffragia*, where devotion was uſed, though erroniouſly, as in this caſe. And we know, that a whole Family in *Spain* pretend to be able to cure Diſeaſes by the toutch, as being deſcended from *St. Katharine*, and are therefore called, *Saludadores*; and that another Family in *France*, who alledge they are deſcended from *St Hubert*, do cure ſuch as are bitten by mad Dogs, and yet neither of theſe are puniſhed by any Law, ſince they aſcribe their Cures to Devotion: And there are but few men who have travelled any where, but uſe ſome Charm or other, out of innocence or railery; and to burn theſe, or the

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common people, who think they may follow their example, were an act of great cruelty. And since the Croſs is allowed by the Canoniſts to be applyed to any part of the body, *per c. non licet. 26. quæſt.* I ſee not why the Name of *Jeſus* may not be applyed, in the ſame way: Nor can I think that the Devil would allow the uſing of that ſacred Name at which he is forc'd to tremble, and by the very naming whereof, all Eccleſiaſtick Hiſtories tell us, that the Devil has been diſpoſſeſt, and therefore, *Ghirland. de ſortil. num. 23.* gives it as a general rule, that *ubi alia nomina ignota ultra Dei nomina inveniuntur, tunc ſuperſtitioſa dici poſſunt & ita puniri. Caſſiodorus* relates, that *multis efficax remedium fuit, trina recitatio verſiculi,* Pſal. 115. *dirupiſti vincula mea, &c.* and *Bartholinus* in his Anatomy, defends, that theſe Verſes repeated with a loud voice in the ear of one affected with the Epilepſie, will cure him,

Gaſpar fert mirham, thus Melchior, Balthaſar aurum,
Hæc tria qui ſecum portabit nomina regum,
Solvitur à morbo, Chriſti pietate caduco.

And though ſome have diſallowed even pious Sentences, or Names, when joyned to ſuperſtitious circumſtances, as when they are only to be writ upon Parchment, and cut too in ſuch a figure, or bound by ſo many threeds only, yet to condemn the uſers as Witches, when they are uſed ſimply, as here, ſeems to be the other extream.

In things that are abſtruſe and dubious, the Law ſhould ſtill favour that which tends to the good of the Common-wealth: yea, and though it ſometimes may puniſh Charms, when uſed to the diſadvantage of men, though it know them not certainly to be unlawfull; yet, it doth not follow, that it ſhould puniſh that which may tend to their advantage, except they know it to be certainly unlawfull. And though our Act of Parliament puniſhes ſuch as ſeek help by unlawfull meanes of Sorcerers, or Necromancers, yet they muſt firſt be prov'd

to

to be Sorcerers, or Necromancers, who make a trade of abuſing the people, as that Statute ſayes, which cannot be drawn at all to a dubious Cure uſed in one caſe, and by the application of natural means; and therefore, though *Drummond* was burnt as a Witch, albeit he had never committed any maleficc, but had only cured ſuch as were diſeaſed, yet having in a long habit and tract of time, abuſed the people, and uſed Spells and Incantations, which had no relation at all to Devotion; and having continued that trade, albeit he was expreſly diſcharged, his caſe was very far different from this, and deſerved a far more ſevere puniſhment. The ſame may be likewiſe anſwered to the condemnatory Sentence pronunced againſt *John Burgh*, who was convicted of Witchcraft in *anno*, 1643. for pretending to cure all diſeaſes, by throwing into water an unequal number of pieces of Mony, and ſprinkling the patients with the water; ſo that it may be juſtly ſaid, that theſe died rather for being publick cheats *& falſarii*, then for being Witches, *& venefici*. Upon which account *ars Pauliana* alſo is puniſhable, by which ſome Cheats pretend to cure diſeaſes, by Spells and pious Characters, revealed (as they pretend) to S. *Paul*, when he was carryed up to the third heavens; for, here the foundation makes the cures known to be cheats.

I might likewiſe alledge here, that it is againſt the conſeſt principles of all Criminaliſts, that *una venefica non poteſt eſſe ligans & ſolvens in eodem morbo*, cannot both put on, and take off a diſeaſe; for, it ſeems that the Devil thinks, that it were too much to beſtow ſuch favours upon one of his favourits, ſo that he is juſter then thoſe, who affect plurality of Benefices; or elſe he thinks it would leſſen too much the eſteem of thoſe faculties, if one could exerce both; or elſe it is not probable, that ſhe who had the malice to lay on the diſeaſe, would condeſcend to ſerve in the taking it off. But however, I find much weight hath been laid upon this principle, by thoſe who did debate *Margaret Hutcheſons* Proceſs, and ſo let it have its weight.

The third Article of my Clients endictment is, that it is deponed by two dying and penitent Witches, that she flew like a Dove with them to their meeting places.

This Article seems to me very ridiculous; for I might debate, that the Devil cannot carry Witches bodily, as *Luther*, *Melanchton*, *Alciat*, *Vairus* and others assert, because it is not probable, that God would allow him the permission constantly to work this miracle, in carrying persons to a publick place, where they joyn in blaspheming His Name, and scorning His Church. Nor is it proper either, to the nature of heavy Bodies to flee in the air, nor to Devils who are spirits, and have no armes, nor other means of carrying their Bodies: but I may confidently assert, that he cannot transform a woman into the shape of a Dove, that being impossible; for how can the Soul of Woman inform and actuat the body of a Dove, these requiring diverse Organs, and administrations; and to believe such transmutations, is expressly declared Heresie by the Canon Law, and to deserve excommunication *cap. Episcopi, 26. quæst. 5.* and is condemned by St. *Augustin, lib. 18. de civit. Dei, delrio lib. 2. quest. 18. Girland. §. 7.* and though the Scripture tells us, that *Nebuchadnazor* was transformed from a man to a beast by God, yet it follows not that the Devil hath that power; or as some Divines assert, he did but walk, feed, and cry like a beast, and had brutish thoughts.

We must then conclude, that these confessions of Witches, who affirm, that they have been transformed into beasts, is but an illusion of the fancy, wrought by the Devil upon their melancholy brains, whilst they sleep; and this we may the rather believe, because it hath been oft seen, that some of these confessors were seen to be lying still in the room when they awak'd, and told where, and in what shapes they had travell'd many miles: Nor is this illusion impossible to be effectuated by the Devil, who can imitate nature, and corrupt the humours, since melancholly doth ordinarily perswade

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men, that they are Wolves (*Licanthropi*) Dogs, and other Beasts.

Since then these confessions are but the effects of melancholy, it follows necessarily, that the depositions of these two Witches amounts to no more, but that they dreamed that my Client was there: and were it not a horrid thing, to condemn innocent persons upon meer dreams, as is concluded by *Franc. Ponzan. tract. de lamiis. cap. 1. num. 50. Sunt illusæ, ergo non est standum ipsorum confessionibus: confessio enim hæc deficit in suis principiis, & est contra naturam, & ita impossibilis.* I confess, that such confessions may be a ground to condemn the confessors, because though they were not actually where they dream'd, at these meetings, yet it infers that they had a desire to be there, and consented to the Worship, and believed that transformation to have been in the Devils power; but all these are but personal guilts in the confessors, and cannot reach others. And besides this, it is very clear, that the depositions even of confessing and penitent Witches, are no concluding probation; for they are *socia criminis*, and such are not to be believed, they are infamous persons, and such ought not to be believed; and they can give no sufficient *causa scientia* and reason of their knowledge, the want of which doth in Law enervat the deposition of a Witness: and with us, the depositions of dying Witches were repell'd, in the case of *Alison Folly, pen. Oct. 1596.*

Divines, whose punishments reach no further then Ecclesiastick censure, may punish not only certain guilt, but scandal; yet Lawyers, being to inflict so severe a punishment as Burning, and loss of all their moveable Estate, should not punish but what they know infallibly to be a real guilt, nor should they punish that guilt, till it be convincingly prov'd. For, though this woman were guilty, yet if she be so, she will suffer by the sting of her conscience here, and will be reserv'd for a greater fire hereafter, then you can ordain for her; whereas if she be innocent, your sentence cannot be reformed. And why should you take pains to

augment the number of the Devils servants in the eyes of the world?

Nor doth the Civil Law punish alwise what Divines condemn; for thus, though it be murder by the Divine Law to kill a Wife taken in the act of adultery, yet the Civil Law allowes it: and though it be unlawfull by that Law to cheat our Neighbour in buying or selling, yet the Civil Law allowes all such bargains, except the cheat amount to the value of the half. Thus, the one of the Laws respecting mainly the good of Souls, and the other the good of Commerce, as they have different ends, so they take different measures; and therefore it is, that politick Laws, have allowed cures even by suspected means; which principle is also allowed by *Bartol. Salicet. Azo:* and others, *ad dict. l.* 4. and even according to the principles laid down by Divines, except there were a paction provid, or confest, all remedies should rather be ascribed to nature, then to Witchcraft.

Consider how much fancy does influence ordinar Judges in the trial of this crime, for none now labour under any extraordinar Disease, but it is instantly said to come by Witch-craft, and then the next old deform'd or envyed woman is presently charged with it; from this ariseth a confused noise of her guilt, called *diffamatio* by Lawyers, who make it a ground for seizure, upon which she being apprehended is imprisoned, starved, kept from sleep, and oft times tortured: To free themselves from which, they must confess; and having confest, imagine they dare not thereafter retreat. And then Judges allow themselves too much liberty, in condemning such as are accused of this crime, because they conclude they cannot be severe enough to the enemies of God; and Assisers are affraid to suffer such to escape as are remitted to them, lest they let loose an enraged Wizard in their neighbour-hood. And thus poor Innocents die in multitudes by an unworthy Martyredom, and Burning comes in fashion; upon which account I cannot but recommend to your Lordships seri-

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ous consideration, that excellent passage of a Learned Lawyer, *Baldwinus, ad § Item lex Cornelia jnstit: de publ. jud. Sed quo gravius, & ab hominis ingenio magis alienum est hoc malum, eo major adhibenda est cautio, ne quis ejus pretextu ab adversariis temere obruatur, facile enim hic quid vis confingere potest ingeniosa simultas, ut & multitudinem credulam statim emoviat, & judices irritet ad versus eum quem cum demonibus rem habere mentietur. Ante annos sexaginta, sensit infœlix nostra patria, magno suo malo, hujusce generis calumniis, magna erat Waldentium mentio, quos adversarii jactabant nescio quid commertii habere cum innumeris spiritibus, hujus criminis prætextu optimi quique statim opprimebantur, sed tandem senatus Parisiensis, causa cognita, vidit meras esse sycophantias & infœlices reos liberavit.*

For

For *Titius*, accuſed before the Secret Council for beating his Wife.

XVII. PLEADING.

AS nothing but the laſt degree of paſſion could have provockt my Client to correct this unfortunat Woman, ſo no creature which doth not feel his grief, can expreſſe the reaſons, which forced him to it. Nor could the fear of puniſhment, if it were not joyned with the ſenſe of honour, move him to lay open before your Lordſhips, the ſad ſtory of theſe perſecutions he has for ſeven years ſuffered, and the diſhonourable ſecrets of his own family, which during all that time, he has laboured to conceal.

Nor can I (my Lords) but regrate, that I ſhould be forced to lead your reflections into my Clients houſe, and to ſhew you there a Woman burning, not with flames of love, but revenge; embracing her Husband, not out of kindneſſe, but to throw him into the fire; watching him in his ſleep, but that ſhe might even diſturb him in his reſt; inviting his Friends to her houſe, but that ſhe might highten his infamy, in letting them hear her rail againſt him: and all this done, not for a day, or under the excuſes of paſſion, but for ſeven whole years; nor

nor done ſo paſſingly, as that he could entertain any hopes of her reconciliation to allay his grief; but ſhe begun to torment him the next day after the Marriage, beating him with her Slipper, ſo that only his Marriage wanted its honey-moneth, and ſo malitious was her humour, that ſhe could not bridle it for one day. And theſe affronts were dayly continued, moſt deliberatly, and owned after all the remonſtrances her friends could make for reclaiming her, at which occaſions ſhe uſed to ſpeak kindly of nothing to him or them, but her paſsions, juſtifying her lying of him as Wit, her railing againſt him as Eloquence, her revenge as Juſtice, and her obduredneſſe as Conſtancy.

This being the perſon againſt whom I am to plead, I am oblieged to give your Lordſhips ſome character of him for whom I appear, who was not only born a Gentleman, but by being a Souldier, has made himſelf ſo, and by both theſe qualities, has ſo ſtrong an averſion againſt beating any Woman, that the great reſpect he had for that lovely Sex, made this Purſuer, after ten years intimat acquaintance, chooſe him for her Husband; and for ſeven years, he hath not only ſuffered, but concealed his wrongs, to that depth, that his hair hath by grief changed its colour twice, the ſtrength of nature, and grief, overcoming each other by their ſeveral turns. Nor doth he think himſelf concerned to anſwer his Wifes calumnious reproaching him, as having been her Husbands ſervant; for it is moſt true, that after he loſt his Eſtate in his Majeſties ſervice, her firſt Husband choos'd him for his Friend, and after his death, ſhe chooſed him for a Husband; which ſhews, that he had ſome worthy qualities about him, which were able to ſupply that great want, the want of Riches; and is it not clear, that when Women begin to complain of ſo ſacred a relation, they will make faults where they cannot find them? and theſe Wives who would divulge what is true, would invent what is falſe.

I confeſſe (my Lords) that there is very much due to that excellent Sex, when they are, what they ought to be; but our love to Wine, muſt not hinder us to call it Vinegar when it corrupts; nor ſhould we flatter Tyrants, becauſe we love Monarchies. But Judges muſt look more to Juſtice, then complement; and therefore, I muſt beg pardon to alledge for my Client, that he cannot be puniſhed for beating his Wife, becauſe, The Wife is by Law under the power and authority of her Husband, which ſubjection is not only the puniſhment of her ſin, nor will all this power repair to man, the loſſe he had by the injury done him when he got this power; but this power is put in the Husbands hands, for the good, not only of the Common-wealth, but of the Women themſelves: as to the Common wealth, it was fit, that in every Family the Husband ſhould be empowered to correct the extravagancies of his Wife, and not to bring them before the Judge, and in publick, this would have devided families, raiſed publick ſcandals, and many will be content to receive correction in privat, who would never be reconciled after a publick correction. And as to the Women themſelves, it was fit, that ſhe being the weaker Veſſell, a creature naturally paſſionat, and wanting experience, ſhould therefore be governed by, and ſubject, to her Husband; and as the head may reſolve to chaſtiſe or mortifie any part of the body, when it thinks that Diſcipline will tend to the general advantage of the body; So may the Husband, whom the Scripture calls *the head of the Wife*, correct the Wife, when that correction may tend to the advantage of the Family.

Let us but look back upon the firſt ages of the World, and we will find that the Husband had generally power of life and death over their Wives, even amongſt the beſt of men, the Romans, and thus *Plin. lib. 14. cap. 12.* reports, that *Ignatius Mecennius* kill'd his Wife, for having drunk too much Wine,

Wine, and that her death was not enquired into, as that which the Law then allowed. And *Cæsar* tells us, *lib. 6.* that the Germans *in Uxores, sicut in liberos, vitæ necisque potestatem habebant.* And till this day, the southern Nations (whose wits ripen more then ours, as nearer the Sun) have still the same power continued to them, by which the Women loss litle, for it keeps them from adventuring upon these extravagancies, for which our complementing Nations hate their Wives, which to a kind Wife, should be worse then death. But if these Laws think this power of life and death fit for the Husband, it should at least teach us to bestow upon him the power of correction, for which I only plead; which power of correction, is by *Bonaventur* said to be allowed them by the Law of Nations, *4. sentent. distinct. 37. masuer. tit. de p sess. §. item maritus.* By the Canon Law, the Wife is declared to be more in the power of the Husband, then of her Father, *can. sicut alterius 7. quæst. 1.* and that the Husband may imprison her, or keep her in the stocks, *can placuit. 33. quæst. 2.* And if we consider our Law, we will find, that Husbands have the same power over their Wives, that a Father hath over his Child, *c. 131. leg. burg.* which Law saith, *That he should correct her, as not knowand what she should do, and as a Bairn within age, seing she is not at her own liberty.* And as the Council would not hear a Child complaining that his Father had beat him, So neither should they hear a Wife. We have also an expres Statute, *2. Dav. chap. 16.* wherein it is appointed, that no accusation shall be received against a man for having occasioned the death of his Wife, except it be notoriously known, that he gave her wounds whereof she dyed; by which it is necessarily implyed, that he is not punishable, nor cannot be accused for any wounds given which were not mortal; where likewise there is a decision of the said King *David*, related in these terms.

In the time of King David, *a case happened in this manner; An man of good fame gave to his Wife, descended of great blood, an blow with his hand, of good zeal and intention to correct her, and she being angry with her Husband after that day, would not for no mans request, eat nor drink till she deceased, and entered in the way of all flesh. The friends of the Woman accused the Husband for the slaughter of his Wife: And because it was notour and manifest that he did not slae her, nor gave her no wound of the whilk she died, but gave her an blow with his hand, to teach and correct her, and also untill the time of her death loved her, and entreated her as a Husband well affectionat to his Wife; the King pronounced him clean and quit, and thereanent made this Law.*

But, I find it is answered by the Wifes Advocats (who can better maintain, then they could suffer what she has done) that though the Laws of other Ages and Nations, did, and do allow this power to the Husband; yet, our present customs, as well as our inclinations, hate that stretch'd and ungentle power: and though our Law did allow some power to the Husband for correcting his Wife; yet, that power could not be extended to defend such violent courses as were here used, where the Husband did hold her head to the fire till her face was burnt, and did thereafter beat her with a Slipper. Nor do any Law or Lawyers allow more then *modica coercitio* for her correction; but such an excesse as this would be punishable in a Father towards his Child, or in a Master towards his Servant.

To which answer the poor Husband acquiesces as much as they, and by his patience and continued kindnesse, in spight of all these disgraces and affronts, he has testified more respect then the Law could have commanded. But since it is acknowledged upon all hands, that the Husband might have corrected his Wife, and that he is only punishable for having exceeded the just measures which the Law allows, I shall first relate the matter of fact, and shall then examine, if he did not proportion the punishment to the injury.

After

After my Clients Wife had ſwore ſhe would ſtarve her ſelf, if he would not renunce all her Eſtate, he (good man) condeſcended to her extravagant deſire; but not ſatisfied with this, ſhe ſwore ſhe would kill him, if he did not leave the Country: and finding that he came in at night, ſhe beat him with her Slipper, but finding he only ſmiled at this, ſhe came running up to him with a knife in her hand, whereupon he threatned to hold her head to the fire, if ſhe would not calm, and ſo took the knife from her. Notwithſtanding of all which, both kindneſſe, and threats, ſhe did a third time flee in his face, but at laſt, fearing his patience might not only prejudge himſelf, but her, he did take her and hold her face a little to the fire, but without any deſign, ſave of terrifying her; but ſhe being ſtrong, and malice ſupplying what ſtrength her Sex denyed her, wreſtled out of his hands, and in wreſtling, threw her ſelf upon the fire, and burnt a little her own face. All which ſhall be proved by witneſſes, who ſaw the whole tract of that unhappy buſsle, for it was an aggravation of her guilt, that ſhe uſed him thus publickly.

This being the ſtate of the caſe, I hear ſuch as ſtand behind me ſwear, had ſhe been mine, I had drowned her, or ſtarved her, and I conjure your Lordſhips to reflect what any man would have done in that caſe; but I ſhall only debate, that this guilt deſerved a more ſevere puniſhment, then what he inflicted. For, 1. in proportioning the puniſhment to the guilt, your Lordſhips will be pleaſed to conſider, that the Husband never having puniſhed her former extravagancies, was here to puniſh at once, all that ſhe had formerly done, and if every offence deſerved correction, ten thouſand offences deſerved one that was very great; and if the Law after it hath puniſhed the firſt two ſmall theſts, puniſhes the third with death, and after it hath puniſh'd breaking yards with ſmall pecunial mulcts, maketh the third capital; may not the hundreth offence in beating a Husband, and laying ſnares for his life, deſerve all

done, where the former faults were also to be punished? And since no Judge could have refused to have burnt her in the Cheek for three such riots, sure the Husband cannot be punished for punishing a hundreth at the same rate; and I hope your Lordships will imagine, that a Husband who suffered so many affronts, would not have been too violent in punishing the last, and that she hath her self to blame, having contemned the warning given her by her Husband, and in giving of which warning, it clearly appears, that he was master of his passion, and proceeded both kindly and judiciously; or though he did deserve a punishment, yet by-past sufferings, torments and affronts, may do more then satisfie her, for that one injury, of which she can only complain: and as in ballancing accounts, so in ballancing mutual crimes, we must not look to the debt and credit of one day, but considering all that either party can lay to one anothers charge, we must at the ballance only determine who owes most, and if that method be followed, then sure your Lordships will find, that as injuries may be compensed amongst the parties themselves, in so far as concerns their privat interest, so here, my Clients Wife having been more guilty towards him a thousand times, then he can be said to have been towards her, though this riot were acknowledged, her interest ceases, and her complaint doth become thereby most unjust.

Though the Law designs to restrain our vices, yet because it cannot root out our passions, it pitties them; it employes its justice against our crimes, but its clemency against our passions: and so high did this clemency run in the Roman Law, that he who in passion kill'd his Wife, being taken with her adulterer, was not punished as a murderer, *qui impetu tractus doloris interfecerit*: and the reason the Law gives for remitting the crime is, *cum difficillimum sit justum dolorem temperare, l. 38. ff. ad. l. jul. de. dult.* And if any passion deserves pardon, it must in him who has bestowed pardons for seven years; or if it may plead against any, it must be against her who raised injustly, the

passion

paſſion of which ſhe complains. Injuries from a Wife are crimes; and if injuries can juſtifie paſſion amongſt ſtrangers, much more can they do it in a Husband.

I hope your Lordſhips will likewiſe conſider, that ſelf-defence is not only a privilege introduced by Law, but a duty impoſed upon us by nature; and without this, this world were nothing but a ſcaffold, and every man with whom we converſed, might prove an executioner. Nor doth this ſelf-defence only ſecure us when we kill ſuch as would attacque our life, but it ſecures us likewiſe when we chaſtiſe ſuch as would ſtain our honour; for life without honour, is but as a dead carcaſs, when the Soul is fled, or a King when he is dethroned. And ſince the Law has paralleld life and honour in every thing, it is moſt juſt, that ſeing we may kill ſuch as invade the one, we may at leaſt chaſtiſe ſuch as invade the other; eſpecially ſeing theſe who are here puniſhed, have only themſelves to blame, as the authors and occaſions of all thoſe accidents of which they complain: and therefore, my Lords, I ſhall intreat you to figure to your ſelves, what a man could do, if his Wife ſhould conſtantly reſolve to ſpit in his face when he were amongſt ſtrangers, or conſtantly awake him when he reſolved to reſt: were it not ridiculous to put the Husband alwayes to complain to a Judge in thoſe caſes? and yet to ſuffer ſuch injuries to be unpuniſhed, were not only to make a man miſerable, but to force him to an impertinent clemency, which might breed up his Wife to an inſufferable inſolence. And if mean people, (who wanting generoſity and vertue, are curbed by nothing but awe and fear) ſhould come to know that the Councill allowed ſuch an indulgence to Women, and that there were no place for the juſteſt complaints of injur'd Husbands, what ruptures would this occaſion in privat Families, what innumerable ſuits before your Lordſhips, and how many ſeparations betwixt Husband and Wife?

Do then, my Lords, by this deciſion, let the people ſee, that as vertuous and deſerving Women may expect the higheſt and pureſt reſpects imaginable, ſo ſuch as ſhew themſelves unworthy of theſe favours, may expect puniſhment anſwerable to their crimes. Nor is it a ſmall aggravation of their guilt, that they endeavour as far as in them lyes, to draw contempt and diſgrace upon that amiable, and deſerving Sex. Thus good Women will be complemented, when they find they owe not the reſpect they get to the Law only, but to their own merit, and unworthy Women will find, they may expect a happier life by taming their own inſolencies, and by living in concord with their Husbands, then they can from their inſolent, and outragious abuſing of them.

The Counſel impriſoned the Husband for one night.

For

For *Charles Robertſon* and his two Sons.

XVIII. PLEADING.

How far Minors may be puniſhed for crimes. 2. *Whether Complices may be purſued before the principal Party be found guilty.* 3. *Whether* Socius criminis *may be received in Riots and leſſer Crimes.*

THE crime for which my Clients are accuſed, is, that in *January*, 1660. the ſaid *Charles Robertſons* Brother and two Sons did convocat the Lieges, and throw down a houſe belonging to *Elizabeth Rutherford*, which they did at their Fathers deſire, or at leaſt, that their Father did ratihabit the ſame.

Againſt this Indictment, it is alledged, that the two Sons, the one being of the age of fourteen, and the other of fifteen, cannot go to the knowledge of an Inqueſt, for throwing down this houſe, ſince they offer to prove, that they were informed by their Uncle, that this houſe belonged to their Father, and that it was their Fathers deſire they ſhould go along with him to throw it down; for though Minors may be puniſhed for attrocious crimes, committed againſt the Law of Nature, ſuch as Murder, Inceſt, *&c.* and to abſtain from which, the youngeſt conſcience doth adviſe: yet, ſuch acts as cannot be known to be criminal, but by ſuch as underſtand poſitive Law, are not puniſhed

puniſhed as criminal, but in ſuch as are oblieged to underſtand that Law. None will contravert, that the throwing down ſuch a little houſe, not exceeding ſix pounds Scots of value, and to which, they and all the Countrey had heard their Father pretend right, cannot be called a crime againſt the Law of Nature; and it is only a crime in poſitive or municipal Law, when it is done by ſuch, as are oblieged at the time to underſtand they are doing an injury, and that the houſe belongs not to him, at whoſe command they are throwing it down, and theſe Children were not oblieged to know this; for ſince they are not in Law oblieged to underſtand their own rights, till they be Majors, much leſſe are they oblieged to underſtand the rights of other men; and in this caſe the underſtanding the matter of rights, is that only which infers the crime, for if the Father had right, this had been no crime in him, nor them.

I am ſure, there is a great diſtinction betwixt acts, which are of their own nature indifferent, ſuch as throwing down of houſes, taking men priſoners, *&c.* and theſe which are of their own nature vitious, and criminal, and need no extrinſick thing to clear that they are ſo, ſuch as murder, and robbery; the firſt doth require the knowledge of ſomething that is extrinſick to the act which is done; nor is the guilt infer'd but by reaſoning, and judgement, and therefore that guilt ſhould not fall upon Minors, except they are *doloſi*, and are preſumed to have done it intentionally and upon deſign, and how can deſign be preſumed in theſe Minors, ſince the committing this act did not take its riſe from them, but from their Uncle, and Father, and they were to gain nothing to themſelves, immediatly by it? nor can it be imagined, why the Law will for want of underſtanding, leſſen the puniſhment in the moſt attrocious crimes, ſuch as Witchcraft, murder, *&c.* in ſuch as are thirteen years of age, if it will not remit abſolutely the guilt, in ſuch caſes as theſe, where the guilt was neither palpable, nor the

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prejudice great. And if Minors be to be reſtored *adverſus delictum* in any caſe, as is clear they are; they ought to be reſtored againſt this, where the guilt doth conſiſt in a *punctilio* or *nicety* of Law, ſuch as, that though the Father had right to the houſe, yet he could not have thrown it down by his own authority; a principle which few countrey men underſtand, when they have reached twenty one years, *ſi delictum fuerit commiſſum ſine dolo poteſt minor juvari ope reſtitutionis in integrum, etiam ad hoc ut à tota pœna excuſetur, Clar. quæſt. 60. & Anan. in cap. 1. num. 8. de delict. puer.* Nor can I ſee a reaſon why crimes by the unanimous opinion of Lawyers are ſaid not to be puniſhable in Minors when they are perpetrat *non committendo, ſed omittendo*, if it be not becauſe omiſſions are *juris*, and fall not under ſenſe, and proceed from a weakneſſe of the judgement; but yet I think the former diſtinction more juſt, ſince omiſſions of what nature requires, ſhould bind them, but nothing ſhould bind them which proceeds from a weakneſſe in judgement, ſince Law allowes Minors to have no judgement.

But whatever be alledged againſt other Minors, yet theſe having obey'd their Father, in an act which was of its own nature indifferent, they cannot be puniſhed for the guilt though he may, for that were to make poor Children unhappy, in ſubjecting them to double puniſhments, for if they obeyed not their Father, they could not eſcape their Fathers anger, or if they did obey, they fall under the Laws revenge. And it were very unjuſt, that the Law which has ſubjected them to the power of their Father, ſhould not ſecure them when they obey that power to which it has ſubjected them. And upon the other hand, it would leſſen much that power which the Law hath taken ſo much pains to eſtabliſh in the perſons of Fathers, and Maſters, over their Children, and Servants, if it gave them occaſion to debate their commands; and though a Son, or a Servant, are not obliegd to obey their Father or Maſter,

in things palpably attrocious, and wicked; yet, where the thing commanded is not neceſſarily, and intrinſecally unjuſt, they ſhould either obey there, or no where; and what a great prejudice were it to the Common-wealth, if a Son or Servant ſhould refuſe to aſſiſt, in bringing back Cattle, which others were driving away, to labour Land, or aſſiſt Poindings, or even throw down houſes at their Father, or Maſters deſire, becauſe they might pretend his right were not ſufficient? and ſo the Father and Maſter ſhould be ſtill oblieged to give an account to his Son or Servant, of his right and title upon all occaſions, and his commands, which require oftimes a ſpeedy execution, ſhould be delayed in the *interim*. To prevent all which, the Law hath for the good of the Common-wealth, allowed Sons, nor Servants, no will of their own, making them in effect but the tools and inſtruments of their Fathers and Maſters will, *Non creditur velle qui obſequitur imperio Patris, vel Domini, l. 4. ff. de reg. jur.* And if the Law allowes them to have no will of their own, it cannot puniſh them when they obey their Maſter, for all guilt is only puniſhed, becauſe it is an effect of the will; and therefore, *John Rae* was not put to the knowledge of an Inqueiſt, as art, and part of theft, becauſe he went only along with his Father, when he was about twelve years of age, 1. of *Januar*, 1662. And by the 19. *cap. num.* 9. *ſtat. Will.* the ſervant is only declared puniſhable, if he do not detect his Maſter, or deſert his ſervice: and *per. l. lib. homo. ff. ad. l. aquil.* it is expreſly decided, that *ſi juſſu alterius manu injuriam dedit, actio legis aquiliæ cum eo eſt qui juſſit, ſi modo jus imperandi habuit, quod ſi non habuit, cum eo agendum eſt qui fecit.*

Though Minors may be puniſhed for a guilt, yet they ought not to be indicted till they attain to the years of Majority, becauſe if they were to be tryed in their leſſe age, they might by want of wit and experience, omit their own juſt defences, and miſmannage the debate in which they were ingaged, as to which, our old Law appears to be very clear, *R. M. lib. 3. c. 32. lib. 2. cap.*

cap. 41. quia dicere vel tacere poteſt calore juvenili, quod ei nocere poteſt: Suitable to which, *Skeen* doth in his Annotations obſerve a deciſion, betwixt His Majeſty, and the Abbot of *Parbroth, anno, 1312. & l. pen. cod. de autor. tut. & l. 1. 5. occiſorum ad S. C. Sillan & cap. 2. de delictis puerorum, extrav.* Since a Minor may be reſtored againſt ſuch omiſſions, or againſt a confeſſion omitted by him, *quando non poteſt aliter contra eum probari crimen,* or may omit to object againſt Witneſſes, it is more juſt and convenient, that he ſhould not be tryed till he be Major. For, if he be tryed, he muſt be once puniſhed, and then his being reſtored is both impoſſible and improfitable: and it were very inconſequential for our Law to have ſo far priviledged Minors, as that they are not oblieged to debate *ſuper hareditate paterna*, and that too upon theſe ſame reaſons I here alledge, and that it ſhould not much more ſecure them againſt criminal tryals in the ſame minority, where the hazard is greater, eſpecially where the Common-wealth is not concerned (as here) to have the guilt immediatly brought to open puniſhment, and where the crime is not attrocious, reaching no furder then privat revenge, and a pecuniary puniſhment. Nor is the publick in this caſe diſappointed of a juſt revenge; for it can reach the Father or Uncle, who are alledged to be the principal actors.

For the Father, I alledge, that he cannot be purſued, as he who was acceſſory to the committing of the crime, in commanding or ratihabiting it, except it were condeſcended from what particular acts his ratihabition can be inferr'd, whether by words, deeds, concealing, or otherwiſe; and it is not ſufficient to lybel in the general, that he did ratihabit, no more then a Lybel would be relevant, bearing, that my Client were guilty of treaſon, without condeſcending how, as is clear by the opinion of all Lawyers, who require, that Lybels ſhould be ſpecial, which is required by them, to the end that the relevancy of the Lybel may be debated and determined

by the Judges, before it go to a tryall, which ſhould be rather done amongſt us, then any other Nation, becauſe the probation is in this Kingdom tryed only be an Aſſize, and theſe are ordinarly men who underſtand not the intricacies of Law; whereas if the particular way and manner of ratihabition be not condeſcended on, and diſcuſt by the Judges, it muſt come to be debated after the probation before the Inqueiſt; and thus not only relevancy, and probation, matter of Law, and matter of Fact, but even the diſtinct offices of Juſtices, and Aſſizers, will be here confounded. As for inſtance, if the purſuer ſhould prove, that the Father ſaid that all was well done, we would be forced to debate before the Aſſize, that ſuch paſſing words as theſe cannot inter a crime, for elſe many thouſands in a Nation might be found guilty of crimes to which they had no acceſſion: Or if it were only alledged, that he received his Sons into his houſe, it would be likewiſe debated, that the receiving of a mans own Sons into his houſe, cannot infer a crime *in delictis levioribus*, though it may be debated to be criminal in Treaſon, and more attrocious crimes. Upon which, and many other points, the Doctors have writ very learnedly, and to debate ſuch points before ignorant Aſſizes were very dangerous.

It is likewiſe alledged for the Father, that he being only purſued as acceſſory to this crime committed by his Brother, in ſo far as he did either command or ratihabit, it is therefore neceſſar, that the Brother be firſt purſued and diſcuſt, it being a rule in all Law, that the principal ſhould be pleaded and diſcuſt, before him who commanded the ſame to be done, or before the receipter, as is clear by *R. M. lib. 4 cap. 26.* intituled, *The order for accuſing malefactors for crimes*; which agrees likewiſe with the opinion of the Civilians, and particularly *Clar. quæſt. 20. num. 6.* whoſe words are, *Scias etiam quod quandoque proceditur contra aliquem tanquam quod præſtiterit auxilium delicto, debet primo in proceſſu conſtare principalem deliquiſſe.*

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Mars. quæſt. 26. gives an example of it juſt in our caſe, a Father is purſued as acceſſory to his Sons guilt, in which caſe he alledges the Father could not be tryed, till the Son was firſt diſcuſt; *& Alexand. conſilio* 15. *vol.* 1. *dicit, quod niſi prius conſtet de manaatario, procedi non poteſt contra mandantem*; with which the Engliſh Law agrees fully, by which the principal ought to be attainted by verdict, confeſſion, or by outlawry, before any judgement can be given againſt acceſſories, *Bolton cap.* 24. *num.* 38. And therefore, except the Uncle, who was the principal actor here, were firſt found guilty by an Aſſize, my Client as commander and ratihabiter cannot be puniſhed.

To this it is anſwered, that the foreſaid Law of the *Majeſty* holds only in theft, but not in other crimes, and that as to all crimes it is abrogat by the 90. Act. 11. Parliament, *Ja.* 6. by which it is appointed, that all criminal Lybels ſhall be relevant, bearing art and part, without making any diſtinction betwixt principal and acceſſories, and the Father is called here as a principal, having given a warrand, as ſaid is, for elſe the giving warrand for doing treaſonable deeds, or to commit murders, could not be puniſhable, though nothing followed; whereas in all Law, ſuch deeds are criminal in themſelves, and the mandant might be immediatly puniſhed.

To which it is replyed, that this Maxim holds not only in theft, but in all other crimes; for as there can be no reaſon of diſparity given to difference theft from other crimes, as to this point; So the rubrick of the former Chapter 4. is general, and in the fourth Verſe of that Chapter, it is ſaid generally, *That it is manifeſt, that the commander or receipter ſhall not be charged to anſwer, till the principal Defender be firſt convicted by an Aſſiſe.* Which is likewiſe *quoad* all crimes ordained indefinitly by the 29. Act, Stat. *David* 2. Nor can it with juſtice be pretended, that theſe Laws are abrogated by the foreſaid Statute of King *James* the ſixth, for theſe reaſons; 1. That Act doth not expreſly bear an abrogation of the former Laws, and ſtanding

Laws

Laws cannot be abrogat by conſequences: nor can it be, but if the Parliament had deſigned to abrogat ſo old and fundamental Laws and Cuſtoms, they would have expreſt their deſign, eſpecially ſince in criminal caſes, all Lawyers endeavour to make their Laws clear and perſpicuous. 2. No Laws are interpret to abrogat one another, except they be inconſiſtent, ſo infavourable is abrogation of Laws; and it is generally received, that *Leges in materia diverſa ſeſe non tollunt, nec abrogant:* but ſo it is, that theſe Laws here founded on, are moſt conſiſtent with the Act of King *James* the ſixth, and theſe two are *materiæ diverſæ*; for it is very conſiſtent, that a Libel bearing art and part ſhould be relevant, and yet that the principal ſhould be firſt diſcuſſed; for though the principal be firſt to be diſcuſſed, yet, when the acceſſories are to be accuſed, it is ſufficient that it be generally libelled againſt them, that they were art and part, the one of theſe regulats only the way of procedure, *& ordinem cognitionis*, the other regulats the relevancy, and ſhows what Lybel ſhall be ſufficient. Nor was there any thing more deſigned by that Act, *Ja. 6.* but that Lybels in criminal caſes ſhould not be caſt as irrelevant, as is clear by the narrative of the Act. And by the civil Law, *ordo cognitionis, & accuſatio eorum qui opem auxilium preſtiterunt*, are alwiſe accounted different Titles, and are differently treated; ſo that theſe two Laws are very different, and very inconſiſtent. 3. If that Law, *Ja. 6.* had abrogat the former Laws, whereby it is appointed, that the principal ſhould be diſcuſt before the acceſſories, then it had followed by a neceſſar conſequence, that theſe Laws could not have taken place after that Act; but ſo it is, that Defences are dayly ſuſtained upon theſe Laws, as in the caſe lately of *George Graham*, which ſhewes very convincingly, that they are not abrogated.

The reaſons likewiſe whereupon that Law was founded, ordaining that acceſſories ſhould not be purſued before the principal

cipal be diſcuſs'd, are ſtill in vigor, and are ſo juſt and neceſſar, that it were injuſt to abrogat a Law founded upon them; for the Law conſidered, that if the principal were called, he might know many defences, which if they were known to theſe who are alledged to be acceſſories, would certainly defend them; as in this caſe, if the Uncle were called who threw down the houſe, it may be he would alledge, that he did not throw down this Cottage, till the accuſer had conſented, which conſent he poſſibly hath: and this may be neceſſar in a thouſand caſes, as if a perſon were purſued for having been acceſſory to the driving away Sheep, or Neat, he might be convicted, though he were innocent, if the principal were not called, which principal if he were called, might produce a Diſpoſition from the party, or a legal Poinding, either of which being produced, would defend both: whereas upon the other hand, if it were lawful or ſufficient to accuſe any perſons as acceſſories, without purſuing the principal, the accuſer might collude with the principal, and ſuffer him to go unpuniſhed, providing he would keep up the Defences and Warrands, and ſo ſuffer the innocent acceſſories to be condemned.

Is it not a principle in Nature, that *acceſſorium debet ſequi ſuum principale?* And doth not the Law ſtill require, that *prius debet conſtari de corpore delicti?* And how can a man be purſued for hunding out another to throw down a houſe, untill it were firſt known that the houſe was thrown down? Nor is the giving an order to throw down a houſe criminal, though it were proven; except the houſe were according to that order thrown down, and that it was thrown down by vertue of that order, and upon no other account. By all which it clearly appears, that the throwing down of the houſe, which is the principal guilt, muſt be firſt tryed, before it can be enquired, who gave the command.

The laſt, and one of the great arguments, I ſhall uſe to prove, that the principal who threw down the houſe muſt be

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firſt diſcuſt, before my Client can be pannell'd for commanding or ratihabiting, is, that by this method, probation ſhould be led againſt abſents, contrar to the known principles of our Law, and by the connivance or ignorance of the acceſſories, the fame of an abſent perſon may be wounded, and witneſſes ſuffered to depone, who dared not have deponed if he had been preſent; and though that probation led againſt him in abſence would not be concluding, yet it would leave a ſtain; and would engage the deponers to adhere to theſe prejudicat and falſe depoſitions in another Proceſs, to ſecure themſelves againſt perjury.

Whereas it is pretended, that ſometimes command is a crime, though nothing follow, It is anſwered, that where a mandat is of it ſelf criminal, though nothing follow, as in Treaſon, there the giver of the mandat muſt not be purſued as a Complice, or acceſſory, but as the principal tranſgreſſor; nor would the King be prejudged (as is alledg'd) if the principal behoved firſt to be diſcuſt, becauſe it is pretended, that that principal might abſtract himſelf, and thereby cut off the publick revenge, which would otherwiſe juſtly fall upon the acceſſories if they could be apprehended. For to this it is anſwered, that it is eaſie for His Majeſtes Advocat to raiſe a purſute againſt the principal, and if he compear, to proceed againſt him, or if he compear not, he may be denunced fugitive, which is a ſufficient diſcuſſing of him as a principal, and will open ſufficiently a way to proceed againſt the Complices.

It is likewiſe alledged, that the witneſſes which are offered to be adduced againſt my Clients, for proving that they committed this crime, are not *teſtes habiles*, and cannot be admitted, becauſe I offer to prove by their own oath, that they were at the pulling down of the houſe, and did actually pull it down, and ſo are *ſocii criminis*, and conſequently are repelled from witneſſing, by the 34. *cap. ſtat.* 2. *Rob.* 1. where there is an enumeration

enumeration made of thoſe who cannot be admitted to be witneſſes, amongſt whom are *ſocii & participes ejuſdem criminis.*

To which exception, the accuſer anſwers, that though *Socius criminis*, cannot be admitted *pro ſocio*, yet he may be admitted *contra ſocium*, that he may be witneſs againſt, though not for thoſe who were ingaged with him. 2. Though *ſocius criminis* may not be admitted as a witneſſe *contra ſocium*, where the crime in which they were ingaged fixes infamy upon the committers, as Treaſon, Witchcraft, Murder, *&c.* yet in Delicts or rather Riots, ſuch as is the caſting down of a houſe, that tends to infer a pecuniary, and not a capital puniſhment; there *ſocii criminis* may be received as witneſſes; for, the reaſon why they are ordinarily repell'd, is, becauſe in deponing they confeſſe a crime againſt themſelves, *& ſe infamant*, which reaſon ceaſes in Delicts or leſſer crimes, *quæ non infamant.*

It is likewiſe repreſented, that it is moſt clear from Law, that the only reaſon why *ſocii criminis* are repelled from being witneſſes is, becauſe *deponendo ſe infamant*, and ſo they forfeit the capacity and confidence of integrity that the Law repoſes upon all perſons that ought to be believed as witneſſes; by the whole contract of the whole Titles, *ff. & C. de teſtibus.* And by *Clar. quæſt.* 21. *num.* 8. *Dictum ſocii criminis ad hoc ut fidem faciat, requiritur, ut ſit confirmatum in tormentis, cum enim ex proprio delicto ſit infamis, nec debet admitti pro teſte ſine tortura*; and the foreſaid Text of the Majeſty, ought as is alledged, to be interpret only ſo, as to take place *ubi crimen infamat*, and that *dilicta non infamant* is endeavoured to be prov'd by the Statute of King *William*, *de his qui notantur infamia*, where it is ſaid, that *fures, ſacrilegii, homicidii.* and others, *qui ſunt irretiti capitalibus criminibus, repelluntur à teſtimonio.*

If witneſſes in delicts and riots ſhould not be admitted becauſe they are *ſocii criminis*, no delict (ſayes the purſuer) ſhould ever be prov'd; for ordinarly none are preſent but the committers. And ſince after their confeſſion they may be purſued themſelves, it is not probable that they will depone againſt others falſely, eſpecially when they may be overtaken upon their own depoſition.

To which it is duply'd, that it is a rule in Law, that *ſocius criminis, nec pro, nec contra ſocium admitti poteſt, l. quoniam C. de teſt. Maſcard. conclus.* 1418. by which it is clear, that the Law makes no diſtinction whether he be adduced, for, or againſt his Commorads, whether he be adduc'd in crimes, or delicts; and *ſocius criminis* is not only repell'd from being a witneſſe, becauſe he ſtains his own fame, whilſt he depones againſt his companions, but becauſe the Law preſumes that being himſelf under the mercy of the purſuer, he will by an unjuſt depoſition ranſome himſelf from the event of the purſute, and therefore the Law caſts him as a witneſſe; for the Law is unwilling to uſe thoſe who hath offended it, and Lawyers have alwiſe been unwilling to tempt men, by forcing them to depone upon their own errors, for they judged, that theſe who would commit a crime, would eaſily forſwear it. And the Law of the Majeſty formerly cited doth repell *à teſtando ſocios criminis, & infames*, whereas it needed not have expreſt both, if it had comprehended the one under the other, and only repelled *ſocios criminis*, becauſe they were *infames*.

I perceive by Lawyers, that ſometimes they allow witneſſes in attrocious and great crimes, whom they would not have admitted to prove crimes of leſſe conſequence, which proceeds both from the hatred they carry to theſe great crimes, a part of whoſe puniſhment it is that the crime can be eaſily prov'd: but likewiſe to the end the Common-wealth may be the better ſecured; whoſe great concern it is, that Judges be not too nice and ſcrupulous in receiving witneſſes againſt its

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enemies. Nor did the Law think, that men would be ſo baſe and malitious, as to ſeek the death of their enemies by a falſe depoſition, even where poſſiblie revenge would be content to reach their Eſtates. Therefore, by the common Law of Nations in attrocious crimes, ſuch as treaſon, ſimonie or ſacriledge, *ſocii & participes criminis admittuntur, l. quiſquis C. ad l. jul. majeſt. gloſſa in l. ffin. C. de accuſ. ſpecul. tit. de prob. §. 1. Boer. quæſt. 319.* and according to our Law it is appointed by an expreſſe Act of *Sederunt, anno, 1591.* that *ſocii criminis* may be witneſſes in the caſes of Treaſon, and Witchcraft; but I do not at all read, that *ſocius criminis* is allowed to be led a witneſſe in delicts, and all the reaſons that militat for the former cauſe, do militat againſt this. Nor is it poſſible to believe, that the Law which allowes *ſocii criminis* to be witneſſes in great crimes, becauſe they are great, would likewiſe allow them to be led witneſſes in ſmall crimes, becauſe they are ſmall; for ſo the Law would contradict it ſelf, and would build contrarieties upon the ſame foundation: and ſince the foreſaid Act, 1591. allowes them to be led witneſſes in crimes of Witchcraft, and Treaſon, they ought not to be admitted in any other crime, how ſmall ſo ever, for in *privilegiatis, incluſio unius, eſt excluſio alterius.*

It is very clear, that the Law would not admit the teſtimony of a partaker of the crime, to have the force of a preſumption, nor to be the ground of an accuſation, *Salicet. in l. ffin. C. de accuſ.* nor gives it any credit to his depoſition, though he were otherwiſe eſteem'd a moſt credible perſon, *probatiſſimæ fidei, Grammat. conſil. 21. num. 3.* nor doth it believe him though he were deponing againſt a perſon ſuſpected to be guilty, *Bert. conſil. 268.* nor doth it believe a thouſand ſuch witneſſes, though they agreed in their depoſitions, for all theſe joyned together weigh not one preſumption, *Maſcard. ibid. num. 8.* By all which it may appear very clearly, that the Law which reſpects *ſocios criminis* ſo little, doth in no caſe deſign to receive them

in a criminal Court, what ever may be debated for receiving them in civil Courts, for proving civil concluſions.

As to the inconvenience adduced, wherein it is contended, that if ſuch witneſſes were not admitted, no crime could be proved; it is anſwered, that this Argument would urge Judges to receive *ſocios criminis* to be witneſſes, as well in all crimes, as in ſmall crimes; for it is a *Brocard* commonly received amongſt the Doctors, that *quod admittitur ob incommodum, eo magis admittitur, quo magis urget incommodum*; and yet here it is confeſt, that they could not be admitted witneſſes in murder, and thoſe greater crimes. But the only natural concluſion that could be drawn from this inconvenience, is, that *ſocii criminis* ſhould be admitted witneſſes in occult crimes, ſuch as conſpiracies, but not in ſuch crimes as this where there could be no penury of witneſſes, being alledged to be commited in open day, in the midſt of a Town, and with a convocation. But to conclude all, I need only ſay, that my objection againſt theſe witneſſes is founded upon an expreſſe Law, and therefore it cannot be taken away by this diſtinction, except this diſtinction can be eſtabliſht upon, and maintained by another Law as expreſſe.

The Juſtices found, that theſe Minors being puberes, *might be try'd, and ſo found that they ſhould paſſe to the knowledge of an Inqueiſt.*

2. *They found the Father ſhould paſſe to the knowledge of an Inqueiſt, as art and part, though the principal actors were not yet diſcuſt.*

3. *They found, that* ſocius criminis *could not be received a witneſſe in any criminal purſute, though the puniſhment could only reach to a pecuniary mulct.*

AN

AN ANSWER

To ſome REASONS printed in *England*, againſt the overture of bringing into that Kingdom, ſuch *Regiſters* as are uſed in *Scotland*.

IN the firſt Ages of the World, when man had not fallen ſo intirely as now from his original innocence, Laws were made rather to govern reaſonable men, then to prevent cheats. But when fraud did begin to grow up with ſubtilty, Legiſlators being warned to guard againſt future abuſes, by theſe they had ſeen committed, did in all places endeavour to reform their people, by reforming their Laws, *& ſic ex malis moribus bona orta ſunt leges*; and becauſe wiſe men look upon themſelves as ſprung from the ſame divine original, therefore they have ſtill been intent to borrow from one another, what excellent conſtitutions they found to have been invented by them. Thus though *Scotland* did adopt the Laws of the Romans (called now the civil Law) into the firſt place next their own; yet, ſuch eſteem hath that Kingdom alwayes had for their neighbours of *England*, that they have incorporated into the body of their own Laws, very many Engliſh Forms

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and Statutes. And as ſome Sciences, Trades and Inventions flouriſh more, becauſe more cultivat in one Nation then another, humane nature allowing no univerſal excellency, and God deſigning thus to gratifie every Countrey that he hath created; So *Scotland* hath above all other Nations, by a ſerious and long experience, obviated moſt happily all frauds, by their publick Regiſters. And though they are not furder concerned to recommend this invention to their neighbours, then in ſo far as common charity leads them, yet finding their Regiſters ſo much miſtaken in a diſcourſe, entituled, *Reaſons againſt regiſtring Reformation*, I thought it convenient to repreſent a ſhort account and vindication of them. Regiſters are appointed in *Scotland*, either for real Rights (for ſo we call all Rights and Securities of Land) or for perſonal Obligations, by which a man binds his Perſon, but not his Eſtate. Men ſell their Land in *Scotland*, either abſolutely, or under reverſion; If abſolutely, it muſt be either to the ſellers own Superior, or to a ſtranger; If to his Superior of whom he holds his Land, it is tranſmitted with us by an Inſtrument of Reſignation in the hands of his Superior, *ad perpetuam remanentiam*, whereby the Propriety is conſolidated with the Superiority, and this Inſtrument muſt be regiſtrat. But if he ſell it to a ſtranger, then the acquirer muſt be ſeaſed, and this Saſine muſt be regiſtrat within ſixty dayes. Or if a man do not abſolutely diſpone his Eſtate, but retain a power to redeem the ſame, upon payment of the ſum for which it is wodſet or morgaged, then the Paper whereby this power is allowed, is called a Reverſion, and it muſt be regiſtrat within ſixty dayes alſo. If any Heretor be ſuſpected by his friends to be prodigal, or unfit to mannage his own affairs, he interdicts himſelf to his friends in a Paper, wherein he oblieges himſelf to do no deed without their conſent: Or, if a Creditor who lent his money to an Heretor, find that Heretor intends to ſell his Eſtate, without paying him, albeit he did lend his money in contemplation of that Eſtate, which the bor-

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rower then had; he makes an application to the ſupreme Judicature of the Kingdom, called *the Lords of the Seſsion*, and from them obtains a warrand to inhibit his Debitor to ſell that Eſtate, till he be payed, which Interdiction or Inhibition muſt be firſt publiſhed at the Mercat-croſs where the Lands lye, and then regiſtrated within fourty dayes.

There are two of theſe Regiſters, or publick Books, one in the chief Town of the Shire, and another at *Edinburgh*, which ſerves for all the Shires, and in either of theſe, all theſe Saſings, Reverſions, Interdictions, and Inhibitions may be regiſtrated: So that when any man intends to buy Lands, he goes to the Keepers of theſe Regiſters, who keeps a ſhort breviat of theſe in a book apart, called the *minute Book*, (bearing the day when any Inhibition was preſented againſt ſuch a man, at the inſtance of ſuch a man) and there he finds for a Crown, what incumbrances are upon the Eſtate he intends to buy, and if he find none, he is ſecure for ever.

As to perſonal Bonds, they need not be regiſtrated, but if the Creditor reſolve to ſecure his Bond againſt loſſing, or if his Debitor refuſe to pay his money, when he calls for it, then he gives in the original, or principal Bond to the Regiſter, who keeps it ſtill, and gets out an Extract or Coppy of it, collationed by my Lord Regiſters Servants, and ſubſcribed by himſelf or his Depute; for there is a Regiſter for Bonds in every Shire, Town, and Juriſdiction, as well as at *Edinburgh*. This Regiſtration hath with us the ſtrength of a judicial Sentence, and warrands the Creditor to charge his Debitor, to pay under the pain of Horning (or out-lawry) and if he diſobey, the Horning is regiſtrated. And thus every man knows in what condition his Debitor is, as to his perſonal Eſtate, if he begin not to keep his credit; and this Regiſter ſerves both for execution and information.

This being the ſtate of the Regiſters in *Scotland*, the uſefulneſſe of that inſtitution, may appear from theſe following reaſons.

First,

1. There is nothing diſcourages men more from being vigilant in their employments, then when they apprehend that the money which is that product, by which their pains uſes to be rewarded, cannot be ſecured to their poſterity, for whoſe advantage they diſquiet themſelves, and toil ſo much. And thus the Common-wealth will be but lazily ſerved, Trade will be ſtarv'd, and ingenuous ſpirits diſcouraged. Nor is it to be imagined how purchaſers will be, or are induced to be at much pains and expences, to improve their grounds, and adorn their dwellings; when the looſneſſe of their right layes them open to renewed hazards, nor can they enjoy with pleaſure, what they cannot poſſeſſe with certainty. And what frail ſecurities have ſuch as are forced to reſt upon the ingenuity of ſellers, who of all people are leaſt to be truſted? for ſuch as ſell Lands, are either prodigals, who are too vitious, or diſtreſt perſons, who are ordinarly under too many neceſſities to be believed.

2. Regiſters are of all others, the greateſt ſecurity againſt the forging of falſe Papers; for forgers uſe to conceal for ſome time, the papers they forge; Whereas the neceſſity of regiſtrating them within ſuch a time, will either fright the contrivers, from doing what they muſt expoſe to the light, or will at leaſt furniſh ſuch as are concerned to have the fraud detected, with means which may be effectual, ſeing it is much eaſier to expiſcat truth whileſt the witneſſes are alive, and all circumſtances recent, then after that a long interval of elapſed time hath carried away the perſons, and obſcured the circumſtances, from which truth could have received any light.

3. Purchaſers being fully ſecured by the publick faith of Regiſters, need not burden the ſeller with a neceſſity of finding ſurety to them for the validity of the rights ſold, which as it reſolves ſtill in an perſonal (and conſequently an unfixt) ſecurity, for the buyers, ſo vexes very much the ſeller and his friends.

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4. The ſecurity, which flowes from Regiſters, cuts off much matter of pleading, and thereby defends againſt thoſe feuds and picques, which laſt ever after amongſt ſuch as are concerned, and keeps Gentlemen at home improving their Eſtates, and Merchants and Tradſmen in their Cantors, and Shops, enriching the Nation.

5. When men are to beſtow their Daughters, they are by our Regiſters, informed, and aſſured of the condition of thoſe with whom they deal, and by their means, men are kept from giving their Daughters and their Fortunes, or a conſiderable ſhare thereof, to Bankerupts, and Cheats. Likeas, the Daughters are by them, ſecured in their Joyntures, and not expoſed after their Husbands death, to tedious ſuits of Law, the dependance whereof draws them to publick places, unfit for their Sex, and the event whereof drives them to begging and miſery.

6. By theſe, the price and value of Land is much raiſed, for by how much more the purchaſe is certain, by ſo much more it is worth.

7. By theſe, Heretors who are oppreſt by debt, are relieved by the ſale of their Lands, upon which Buyers now adventure freely; whereas, if they were to rely upon the faith of the Sellers, their Eſtates might continue unſold, till the Rent of their money ſhould eat up the Stock.

8. By theſe, Uſury and unfrugal Tranſactions with Brockers and others, are much reſtrained; for if purchaſes of Lands were not ſecure, men would rather chooſe to hazard their money ſo, then upon Land.

9. By theſe, Parents know when their Children, and Kinſmen, when their Relations debord, and burthen their Eſtates, and are thereby warned to check, or aſſiſt them.

10. By theſe, Strangers and Forreigners are ſecured who reſolved to match with us, or to purchaſe amongſt us, for our Regiſters are equally faithfull to all.

11. By these, Commerce is very much secured; for, if a Merchant, or ordinary transacter refuse to pay his Debts, then his Bond is put in the publick Register, by which the Creditor is secured of payment, and the Debtor is deterred from owing too much.

12. By these Registers, Papers are secured against fire, loss and accidents, to which they are exposed whilest they are kept in privat hands: Whereas, after registration, nothing can destroy them, but what ruines the whole Kingdom, and even in that case, there is still hope of recovering publick Registers, as in our last revolutions.

In this last place, I must crave leave to wonder, why *England* hath already taken so much pains to secure against fraudulent cheating of Creditors, and of Buyers, as is clear from the Statutes cited by the Author, if they intend not to prosecute that worthy design. But as an evident mark to know whether Registers be necessary, they may consider, that if any man in *England* can for a Crown, know in the space of a day, the condition of these from whom he purchases, then Registers are not necessary, but if otherwise, they are: If any Lawyer in *England* can assure his Client, that the purchase he makes is secure above all hazard, then Registers are not necessary; but if they cannot, then Registers are necessary; So that it seems *England* hath done too much already, or else that they should do more to secure their people. Yet, since I only design to defend our own Law, and not to impugn theirs, it were impertinent for me to recommend too zealously, that wherein I am not much concerned.

Against this so just and so necessary a Constitution, founded so strongly upon reason, and approved so firmly by experience, the Author of the *Reasons against registering Reformation*, hath put his invention and wit (both which I confesse are very fertile) upon the rack, to find out, and muster up some Arguments, which owe their number and beauty to the unacquaintednesse

ednesse of his Country-men with the model he impugns, and which the Author hath beat out by too much industry, to a thinnesse, that is not able to bear the weight he layes upon them.

His first Argument is founded upon the dangers that arise from innovations, wherein Legislators are not able to have a full prospect of all inconveniences which may follow: But to this it may be answered, that the Law of *England* had not deserved the honour done it by the Author, nor had it swelled to its present bulk, if it had not been frequently augmented by new additions. And as to this project of keeping Registers, *England* may be wise upon the hazard of their neighbours, who by being first practizers, have run all the risque, and taken all the pains which was necessar for accomplishing so great a design.

The second Reason bears, that by Registers, the lowneſse of the fortunes of such who suffered for His *Majesty*, would be discovered, and they thereby exposed to much rigour from their Creditors: But this I humbly conceive, proves more the contrary opinion, then that for which it is adduced; for as it were injust to gratifie such as have suffered for His Majesty, with the liberty of preying upon such as probably lent them, because they were of their principles, and of devouring poor Widowes and Orphans, whose necessities will doubtlesse load one day very much, the consciences of such as might have secured their petty fortunes by the help of the Registers now proposed. And this Argument presses no more against Registers, then it doth against all those laudable and well-contrived Statutes, which are already invented in *England* against fraudulent conveyances, forgeries and impostures; for Registers will not debar them from courses which are legal and honest.

Whereas it is in the third place urged, that Commerce would be a great sufferer by Registers, seing they would lay open the lowneſse of mens fortunes, who do now enrich the Kingdom, and themselves too, upon meer credit; and that they

would discover to Forreigners, the low Estate of *England* at present, and make every privat Estate too well known. It is answered, that all these inferences are drawn from the Authors unacquaintednesse with what he impungs, as was formerly observed; for no man is oblieged to registrat a Bond, which oblieges only to pay money; Nor do men registrat such, except where the Debitor refuses to pay, and so these Registers will not weaken Commerce nor Credit, seing Commerce is not immediatly concerned in real Estates: and even as to personal Estates, or Money, no man suffers by Registers or is concerned in them, but such as have no respect to their credit, and Commerce owes little to such; whereas upon the other hand, the fear of this will be yet a further tye upon men to pay punctually, without which Commerce will soon be starv'd. And by the Registers, Bankerupts will be soon discovered, whereby honest men who are the true Nurses of Trade will be much cherished and secured. And by this answer it appears clearly, that the riches of *England*, neither personal nor real can be made known by the Registers; for only the Bonds of Bankerupts are to be registrated, and though all real Rights must, yet the *quota* of the real Estate is not expreſt in the papers to be registrated.

After the Author of that Discourse against *registering Reformation* found, that so unanswerable advantages arise from Registers, as that they could not be ballanced by the inconveniences which he laid in the other Scale, he is pleased (which is ordinary for such as cannot prevail by reason) to reflect upon *Scotland*, as a poor Countrey, and against the Scots as an unmercifull people, and to alledge, that their poverty, and severity introduced those Registers, and made them necessary with us, but that they would never agree with the rich, and tender-hearted *English*; Which reflections deserve rather our pitty, then our answer. Leaving then this womanly way of arguing, as unfit for the Scots, who study to be Philosophers

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in their Writings, as well as in their Humours; It is humbly conceived, that Regiſters do reſtrain no mans compaſſion, for no man doth vertuouſly indulge his Creditor, but he who knows the lowneſſe of his condition, which he cannot without Regiſters; Ignorance is leſſe the mother of vertue, then of devotion. Regiſters prejudge only ſuch as are Cheats, and ſuch deſerve little compaſſion; Nor are our Laws more ſevere againſt Debitors who pay not, than the Laws of *England*; for both impriſon ſuch, and the only weak ſide in our Law is, that it allows too much our Judges to ſuſpend the payment of Debts, and I never heard the Engliſh, who live amongſt us, complain of any other defect in our Laws. Our Laws are extracted from the Civil Law, and ſuch Doctors as writ the Law of Nations; And ſtrangers underſtand our Law ſooner than any other Law in the World, except their own; And our Captions for impriſoning Debitors, who refuſe to pay, are expreſly warranted by that Law of the Romans; which though it was the beſt Law in the World, and is univerſally acknowledged to be ſuch, yet was more ſevere then ours. The comparing of Nations as to their poverty and riches, brings more heat then light; Nor can any difference betwixt the Nations in theſe, make any difference as to this deſign; or if it doth, it may be debated with reaſon, that Regiſters are fitter for a rich, then a poor Nation; for where there are moſt buyers, and moſt Land to be bought, Regiſters are there moſt neceſſary, ſeing they were invented to inform buyers, as to the incumbrances wherein Eſtates are involved by the multiplicity of purchaſers. Where there is but little Land, and where the Creditor is poor, there the Creditor may have time, and leiſure ſufficient, to watch the ſmall Eſtate of his Debitor. Our Nation ſupplies their neighbours with Corns, and Cattel, Lead, Copper, Timber, Coal, Salt, and many other neceſſaries; whereas in exchange of theſe, it receives only from them Wine, Spices, Silks, and other ſuperfluities, which as *England*, no more than *Scotland*, hath

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growing within their Countreys, ſo it is probable that both Nations would live more happily without them: and thus it appears, that *Scotland* is not ſo poor, as theſe reaſons are.

I would here put an end to theſe obſervations, if I were nót unwilling to ſuffer that Gentleman to continue in his error of thinking, that our regiſtration of Movable Bonds ows its origin to the *Caurſini*, the Popes brokers in *England*, and to the *Camera Apoſtolica*, under the reign of *Henry* the third; for as it is moſt improbable, that our Nation would borrow ſo fundamental a Conſtitution, from what was practis'd in a Nation that was in enmity with them at that time; ſo it is no way probable, they would have followed the methods of the Popes Agents at that time, when they were oppreſt by their Maſter the Popes endeavouring to ſubject their Clergy of *Scotland*, to the See of *York*, and by theſe Agents themſelves, in ſuch mercileſſe Exactions.

But the truth is, that though the compleating of this excellent Conſtitution, is an honour due to *Scotland*; Yet, its firſt origine is rooted in the Roman Law; and moſt Nations of the World do at this day uſe Regiſters, which may be thus cleared.

The Romans, to reſtrain exceſſive Donations, appointd them *inſinuari apud Judicem, ut obviam iretur fraudibus*, which Inſinuation was the ſame with our Regiſtrations; thereafter they uſed *Regeſta, quæ vulgo regiſtra, quaſi regeſtaria dicuntur, illa erant acta tabulæ publicæ*, which were at *Conſtantinople*, and in the Eaſtern Empire, called ὑπομνήματα, as *Prat.* obſerves: and by *Vopiſcus in Probo*, are called *Regiſtra. Uſus eſt enim (inquit* Vopiſcus *) regiſtris, ſcribarum porticus prophyretica.*

The Romans had likewiſe publick Books, wherein papers were preſerved, which were under the Weſtern Empire called *Archiva tabularia & tablina*, but under the Eaſtern Empire were

were called *Grammatophilacia*, *ubi inſtrumenta publice deponuntur*, as *Ulpianus* obſerves, L. Moris. ff. de pœnis, § 6.

That other Nations beſides *Scotland* uſe to preſerve their Papers in publick places, and appoint their privat Rights to be made publick and known by regiſtering them, appears from *Alex. conſil.* 16. wherein he treats of the Regiſters *Civitatis Rheg.* And by his *conſil.* 23. wherein he treats of the Regiſters *Civitatis Arimini*; And at *Rome* they uſe *Regeſtrum ſupplicationem apoſtolicarum*; And another Regiſter *Literarum Apoſtolicarum*, *Caſtr. conſil.* 345. But the Regiſters uſed by us, have been allowed, and imitated by the French moſt exactly; for a Conſtitution, *anno*, 1553. made by *Hen.* 2. provides, that all Diſpoſitions, Contracts and Obligations exceeding fifty Livres, ſhall be regiſtrat; and if it be not regiſtrat, it ſhall be null, in ſo far as concerns third parties; the narrative of which Law, proves the advantageouſneſſe of Regiſters; for it bears, *that after all other means have been eſſayed, we find that there was none ſave this of Regiſters to make our Subjects live in aſſurance, to obviat all Debates, and to prevent Cheats:* In which, and theſe other Conſtitutions which follow upon it, all the methods uſed by us are exactly ſet down, ſuch as the marking of Regiſters in every leaf, the having particular Regiſters in every inferior Juriſdiction, and the marking of the principal, or original Papers upon the back; there alſo the Coppies collationed are called *Extracts*. But that in this they imitated us, is clear, for we had Regiſters before the year, 1449. becauſe by the twenty ſeventh Act, fifth Parl. *Ja.* 3. Reverſions are appointed to be regiſtrated; which Act ſpeaks of Regiſters as then in being, and fully eſtabliſhed.

I find alſo, that in the old Hanſiatick Maritime Laws, *tit.* 11. *art.* 4. it is provided, that *nullus nautarum, ullam ſilliginem, aut alia bona navi importet, vel exportet, ſine ſcitu naucleri, & ſcribæ navalis ubi etiam in regiſtro poni debent.* Which I obſerve to clear,

clear, that all Ages and Nations, Traffiquers by ſea, as well as Lawyers by land, have thought Regiſters advantageous for Commerce, and a ſure fence againſt Cheats: and if Regiſters be neceſſary in ſuch mean, and tranſitory occaſions, as Loadings and Moveables, much more are they neceſſary in Lands, which as they are of the greateſt importance, ſo are of the longeſt duration.

Since then Regiſters have been found ſo advantageous, and that experience hath herein ſeconded reaſon, it is humbly conceived, that *Scotland* is much to be magnified for their Regiſters; And that *England* may, without diſparagement, introduce this new amongſt their old Statutes, whereby they cannot be ſo properly ſaid to innovat, as to enrich and augment their own Law, *Nec pudet ad meliora tranſire.* But, I know that Nation to be ſo wiſe and provident, that if they underſtood our Regiſters, as well as they do their own concern, they would eaſily prefer them to thoſe Reaſons, which this Gentleman has offered againſt them.

FINIS.

Adde before the figure 2. lin. penult. Page 27. In anſwer to the French Pleading.

And that this condition can only be purified, or ſatisfied by a natural, and not by a civil or fictitious death, is clear by very expreſſe Laws, as *l.* 8. *ff. de. cap. dimin:* where it is ſaid, *Eas obligationes quæ naturalem præſtationem habere intelliguntur, palam eſt capitis diminutione non perire, quia civilis ratio naturalia jura corrumpere non poteſt.* Thus *Gaius*, one of the beſt Roman Lawyers hath ſaid, that ſuch interpretations doth corrupt the Law, and in effect mix things that are very different, invading the limits of Nature, and ſtretching fictions further than they ought to go: and therefore, ſuch criminal ſentences as do not really kill, *ſed fictione civili caput diminuunt*, are not termed death, but a puniſhment next to death, *deinde proxima morti pœna, damnatio in metallum, l. capitalium, ff. de pœnis.* This likewiſe *Papiniam* decides, *l.* 121. *ff. de verb. oblig. in Inſulam deportato reo promittendi ſtipulatio ita concepta cum morieris dari non niſi moriente eo committitur.* And upon the ſame ground, *l. cum pater, § hereditatem, ff. de legat.* 2. he determines our caſe expreſly, and aſſerts, that ſuch ſentences cannot *in fidei-commiſsis*, be accounted death, *hæreditatem filius cum moreretur, ſuis vel cui ex his voluiſſet reſtituere fuerat rogatus, quo interea in inſulam deportato, eligendi facultatem non eſſe pœna peremptam placuit; nec fidei commiſsi conditionem, aut mortem filii hæredis exiſtere:* With whom agrees, *Paulus l. ſtatius §. Cornelia fœlici, ff. de jure fiſci.* Cornelia *felici mater ſcripta hæres rogata erat reſtituere hereditatem poſt mortem ſuam, cum hæres ſcripta condemnata eſſet, & à fiſco omnia bona mulieris occuparentur dicebat fœlix ſe ante pœnam eſſe, hoc enim conſtitutum eſt, ſed ſi nondum dies fidei commiſsi veniſſet, quia poteſt ipſe mori, vel etiam mater alias res acquirere repulſus eſt interim à petitione.* Thus we ſee, that all the Roman Lawyers have conſpired to allow only natural death, to ſatisfie ſuch conditions as this is; death is

the laſt of all things, *verum ultima linea*, and therefore theſe ſentences leaving ſtill room to hopes and expectations, cannot be called death, which with the perſon cuts off all theſe. It is thought by the beſt of men already, that death comes too ſoon, why then ſhould we precipitat it, and force it upon men before its time? And ſince one death is thought by all a ſevere enough puniſhment, why ſhould we multiply a thing that is but too oft too unwelcome? Death is too ſerious a *thing*, to be counterfeited by ſuch fictions, and too ſevere thing to be quibled upon, by ſuch interpretations.

Adde to pag. 124. *lin.* 20. *at theſe words*, after victuall was expreſly prohibited.

I find, that by the Roman Law, *l.* 2. *C. que res export. non deb.* it is declared unlawfull to carry or ſell Arms to the enemies of *Rome*; but though in Law, all that is not forbidden is allowed, and that there be there a full enumeration of what ſhould not be carryed into enemies, yet Corn is not at all ſpecified. And by the Canon Law, all ſuch as ſupply Turks, and the other Enemies of Chriſtian Religion, with Guns, Swords, *& aliis metallorum generibus, & inſtrumentis bellicis*, are anathematiz'd; yet, there is no execration pronunced againſt ſuch as ſupply them with Victuals: and though to carry Wine or Oyl to Barbarians was puniſhable by the Roman Law, *l.* 1. *C. eod. Ne quidem guſtus cauſa, aut uſus commerciorum*, leaſt the delicacies of the Italian Fruits ſhould have tempted thoſe to invade it, yet, that Law did not at all reach their Allies, nay, nor did it ſo much as prohibit even in Subjects, the ſending Corn to Enemies who were not Barbarians: ſo that what ever may be

alledged

alledged against Allies, who buy Corns to carry into Enemies; yet it seems most unjust that the Swedes, who carry in only their own product, either Corn, or stock-fish to sell them, should be proceeded against as enemies upon that account; and at this rate, *Sweden* could no where sell their Corn, nor other native Commodities, for they can only vent them either in *Holland*, *France*, *England*, or *Denmark*, and all those being now ingadged in this War, the poor Swedes behoved to loss all their own Rents, and want all these necessaries with which they can only be supplied from the product of these, and here the Swedes cannot be so properly said to supply the Hollanders, as to entertain themselves, and His Majesty would sooner starve thus His Allies, then His Enemies. And though Princes may impose these hard terms upon their own Subjects, yet it were hard they could tye their Allies to the same terms; which makes me believe, that the decisions related by *Boer. decis.* 178. and by *Christinaus*, *decis.* 64. wherein they relate, that the exportation of Corns in time of War is a sufficient reason for confiscating both Ship and Goods, *Frumenta, Vina & Olea, existente prohibitione ad exteros, praesertim inimicos, exportare non licet, Christian. ibid.* for exportation being only prohibited, it can only extend to Subjects, for none can export properly, but they; for Allies cannot be said to export when they trade, for to export is to carry out of the place where the prohibition was made.

I confesse, that the carrying in Corns to *Holland* may seem a greater supply to them, then it would be to any other Nation, because their Countrey cannot supply them with its native product; yet, since they have the *Rhine*, the *Maze*, and other Rivers open to them, in which His Majesties Ships cannot stop their Commerce, they will be abundantly supplied with Corns, though *Sweden* could be bound up by this Treaty from supplying them: So that His Majesty will prejudge thus His Allies the Swedes, in their Commerce, without wronging his enemies, as to Corn or other Provision.

And

And to clear, that the *Comeatus* here prohibited, is only Corn carryed in to Cities beſieged, or to Armies of the Enemies, but that our Allies are not abſolutely prohibited to carry Corns to any who are in enmity with us; your Lordſhips will be pleaſed to conſider, that *Comeatus* ſignifies properly, a liberty granted to Souldiers to go and return *ſalvum conductum*, as is moſt clear by the whole Title, *C. de commeatu*. And though ſome have taken the word thereafter in a tranſlatitious ſenſe, *pro cibariis & alimoniis exercitus*, yet to extend that to all Corn carryed in by way of Commerce to an Enemies Countrey, ſeems very hard; Eſpecially where it is not carryed in *alimoniæ ſed commercii ergo*, and though Corn as the ſtaff of life, be ſometimes ſpecially prohibited, yet that ſhould not be extended to Stock-fiſh and other leſſe neceſſary proviſions: and though it were extended to theſe, yet the carrying ſo ſmall a quantity could no more be eſteemed a contravention of the Treaty, then the carrying a little money (without which there can be no Trade) could be eſteem'd a breach of that part of the Treaty, whereby *pecunia* or money is ordained not to be carryed; *Si quis ab initio ſui uſus cauſa exportaverit, poſtea vero quia non indigeret partem vendidit legem non offendit*, Ludovic. *concluſ. 25. circa modum uſus tunc præſumitur cum modico quantitas vendita eſt*, Tuld. *tit. C. quæ res export. num. 6.* From which I conclude, that the prohibition of carrying in Money, or Victualls, can only reach thoſe who carry them in great quantities, or to beſieged Cities, or Armies, or principally for the advantage of the Enemies, and for ſtrengthening them in War againſt His Majeſty; for ſince to reſtrain this, is the only deſign of the Treaty, the words in the Treaty ſhould be interpreted ſuitably to this deſign: and thus this poor Ship can only be condemned for its original ſin, having carryed Contraband in the former Voyage.